

SUPREME COURT. U. S.
TRANSCRIPT OF RECORD

Supreme Court of the United States.

OCTOBER TERM, 1958

No. 397.

**PENNSYLVANIA RAILROAD COMPANY,
PETITIONER,**

vs.

**GEORGE M. DAY, ADMINISTRATOR AD LITEM
OF THE ESTATE OF CHARLES A. DEPRIEST.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1958
CERTIORARI GRANTED NOVEMBER 10, 1958**

SUPREME COURT OF THE UNITED STATES

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[fol. A]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

12462

Civil Action

On Appeal from U.S. District Court for the
District of New Jersey

Sat below: Madden, J.D.C.

GEORGE M. DAY, Administrator ad Litem of the Estate of
Charles A. DePriest, Plaintiff-Appellant,

vs.

PENNSYLVANIA RAILROAD Co., Defendant-Appellee.

Appendix for Appellant

[fol. 1]

IN UNITED STATES DISTRICT COURT

COMPLAINT

The plaintiff resides at 2985 Atlanta Road, in the City of Camden, County of Camden and State of New Jersey.

1. He is a resident and citizen of the City of Camden, County of Camden and State of New Jersey.

2. The defendant is a corporation organized under the laws of the Commonwealth of Pennsylvania. It is therefore a resident and citizen of the Commonwealth of Pennsylvania.

3. The sum or value of the matters and things in controversy, exclusive of interests and costs, exceeds the sum of \$3,000.00.

4. At all times mentioned herein, the defendant was and still is a common carrier of persons and goods in interstate commerce.

5. On or about December 16, 1915, the plaintiff was employed by the defendant as a locomotive fireman and on or about May 13, 1918, he was promoted to a locomotive engineer, in which capacity he continued to be employed until March 10, 1955, at which time he resigned his employment and applied for his annuity. The relationship of employer and employee between the defendant and plaintiff therefore terminated and ceased to exist on March 10, 1955.

6. During the plaintiff's employment as a locomotive engineer and effective March 1, 1941, an agreement in writing was entered into between the Pennsylvania Railroad Company and the Baltimore and Eastern Railroad Company, as employers, with the Brotherhood of Locomotive Engineers, which agreement was for the benefit of all engineers in road and yard service, including the plaintiff herein, employees of the Pennsylvania Railroad Company and the Baltimore and Eastern Railroad Company, and which said agreement contained, among others, Regulations 4-A-1 and 4-O-2, which said regulations read as follows:

"4-A-1. In all classes of service time of engineers, will commence at the time they are required to report for duty, and shall end at the time the engine is placed on designated track or they are relieved at terminal; except that actual time, with a maximum of fifteen minutes, will be allowed engineers in road service for outside inspection and making out necessary reports at end of tour of duty. Such time will be included in total time on duty in calculating overtime, but will not be included in calculating final terminal delay."

"4-O-2. (a) Where regularly assigned to perform service within switching yards, yard engineers shall not be used in road service beyond such switching limits when road engineers are available, except in case of emergency. When yard engineers are used in road service beyond their switching limits under the conditions just referred to, they shall be paid paid miles or hours, whichever is greater, with a minimum of one

hour, for the class of road service performed beyond their switching limits, in addition to their regular day's pay and without any deduction therefrom for the time consumed in said service.

“(b) Engineers assigned to perform a combination yard-belt or yard-transfer service will be paid road rates of pay as provided in Regulation F-A-1 and will not be entitled to compensation under the provisions of paragraph (a) of this regulation (4-O-2) for the transfer or belt line service performed beyond the switching limits of their terminal as covered by their assignment.”

[fol. 3] “(c) Yard Engineers used beyond their switching limits to perform belt or transfer service will be paid as provided in paragraph (a) of this regulation (4-O-2) for the time spent beyond their switching limits, but they will not be regarded as having run around any regular or extra road engineers when performing such belt or transfer service.”

7. The contract provisions incorporated in Paragraph 6 of this complaint have been construed to mean and were at all times herein understood and intended by the plaintiff and defendant to mean that an engineer regularly assigned to road service who leaves his switching limits and performs a service upon the tracks of a foreign railroad company at a time when no emergency exists and road engineers are available, performs a road service to which he is entitled to one full day's pay for each occasion when he leaves his switching limits and performs such a service. Said contract has further been construed by the defendant to mean that the tracks of a foreign railroad may not be incorporated in the switching limits of the Pennsylvania Railroad Company so as to defeat the compensation provisions hereinbefore referred to.

8. On or about February 1, 1948, the plaintiff herein was regularly assigned to yard service at Old Greenwich, in the City of Philadelphia, County of Philadelphia, Commonwealth of Pennsylvania, said Old Greenwich being a part of Switching District “E” as delineated and pro-

claimed by the Pennsylvania Railroad Company to its employes concerned with such information.

9. Commencing on or about February 1, 1948, while the plaintiff was so assigned to yard service, he was required as a locomotive engineer to leave his switching limits when no emergency existed and when road engineers were available and to perform a service for his employer upon tracks belonging to the Baltimore and Ohio Railroad Com-[fol. 4] pany, known as Tracks Nos. 1 and 2, on the Delaware River Water Front in the City of Philadelphia, where the plaintiff was required to switch and drill cars and trains, although tracks of the Pennsylvania Railroad Company were at hand and available for the purpose.

10. The plaintiff has made claim for his compensation for performing services for his employer upon the tracks of a foreign railroad as required by the rules and regulations of his employer there being between 1000 and 1500 of such occasions, for each of which he is entitled to and claims one full extra day's pay. Said claims were denied by the Road Foreman of Engines, the plaintiff's then immediate superior, by the Division of Superintendant (sic) under whom the plaintiff worked and by the General Manager of the Eastern Region of the Pennsylvania Railroad Company, who is the chief operating officer of the defendant in the region in which the plaintiff was employed. The plaintiff was about to progress his claims to the National Railroad Adjustment Board, Division I, when his retirement occurred and upon the occurring of his retirement, the National Railroad Adjustment Board had no jurisdiction of his said claims but the jurisdiction thereof by reason of the diversity of citizenship hereinbefore pleaded is in this Honorable Court.

Wherefore plaintiff demands of the defendant as damages the sum of \$27,000.00 and elects that his retirement shall be a permanent dissolution of the employer-employee relationship existing between him and the Pennsylvania Railroad Company prior to March 10, 1955.

Powell and Davis, Attorneys for Plaintiff, By James M. Davis, Jr., A Member of the Firm.

IN UNITED STATES DISTRICT COURT

ANSWER

Defendant, The Pennsylvania Railroad, a corporation organized and existing by virtue of the laws of the Commonwealth of Pennsylvania, having its principal place of business at Philadelphia, Pennsylvania, answering the complaint of the plaintiff says that:

1. It has no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 1 of the complaint.

2. It admits the allegations of paragraph 2 of the complaint.

3. It has no knowledge or information sufficient to form a belief regarding the truth of the allegations of paragraph 3 of the complaint.

4. It admits the allegations of paragraph 4 of the complaint.

5. It denies all the allegations of paragraph 4 of the complaint, except that it admits that on December 16, 1915 it employed the plaintiff as a locomotive fireman; that he was subsequently assigned to engineman in which capacity he continued from October 1, 1935; that he relinquished all rights to return to service as of March 10, 1955 and has applied for his annuity.

6. It admits the allegations of paragraph 6 of the complaint but respectfully refers to the agreement mentioned therein for the precise terms thereof.

7. It denies the allegations of paragraph 7 of the complaint.

8. It admits the allegations of paragraph 8 of the complaint.

9. It denies the allegations of paragraph 9 of the complaint.

[fol. 6] 10. It denies all the allegations of paragraph 10 of the complaint in general and the following in particular. It denies that the plaintiff's claims or any of them for compensation (sic) as alleged in paragraph 10 of the complaint have ever been denied by the General Manager of the Eastern Region of The Pennsylvania Railroad Company. The plaintiff's claim or claims alleged in paragraph 10 of the complaint were not progressed or appealed to the General Manager of the Eastern Region of The Pennsylvania Railroad Company either by the plaintiff or by anyone on his behalf. The defendant further denies that the National Railroad Adjustment Board has no jurisdiction of the plaintiff's said claims and also denies that this Court has jurisdiction of said claims.

First Defense

This Court is without jurisdiction over the subject matter of the claims alleged in the complaint.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

The cause of action alleged in the complaint did not occur at any time within six years next before the commencement of this action by virtue whereof the statute of limitations constitutes a bar to the maintenance of this action by the plaintiff.

Fourth Defense

1. All tracks involved, the alleged use of which is complained of in the complaint, are within Switching District "E" to which plaintiff was assigned.

[fol. 7] 2. All movements involved on the occasions mentioned by plaintiff in the complaint occurred within Switching District "E".

3. The plaintiff in going on such tracks as alleged on the occasions alleged did not go beyond Switching District "E"; therefore, no rights accrued to plaintiff under Regulation 4-O-2.

4. The plaintiff in going on such tracks as alleged, on the occasions alleged, did not perform any road service.

5. Regulation 4-O-2 has no application to any service performed by plaintiff in going on such tracks as alleged on the occasions alleged; and no rights accrued under regulation 4-O-2 by reason of plaintiff going on said tracks as alleged on the occasions alleged.

Fifth Defense

Plaintiff did not progress, or appeal his alleged wage claims to the General Manager, or monthly System Meeting of General Managers, which steps are a condition required by agreements between The Pennsylvania Railroad and Brotherhood of Locomotive Engineers and required by the Railway Labor Act before resort can be had to the Railroad Labor Board or any other tribunal.

Sixth Defense

After the stated cause of action was alleged to have accrued, the plaintiff received from the defendant and accepted compensation from the defendant for his services in accordance with his employment agreement with the defendant. By reason thereof the plaintiff is estopped from recovering from the defendant any further compensation for his services.

[fol. 8]

Seventh Defense

No rights can accrue to the plaintiff under the provisions of the agreement alleged in paragraph 6 of the complaint even if said provisions could be construed as stated by plaintiff in paragraph 7 of the complaint, for then the said provisions are void as against public policy and work a forfeiture, which the Courts will not enforce.

Eighth Defense

This Court is without jurisdiction of the subject matter because:

a. This action involves the construction of a contract between a railroad employer and a labor union, and under the provisions of the Railway Labor Act, the National Railroad Adjustment Board has exclusive jurisdiction of said action.

b. The application by plaintiff for an annuity under the Railroad Retirement Act and his voluntary relinquishment of the right to return to service did not deprive the National Railroad Adjustment Board of its exclusive jurisdiction over the subject matter of this claim for wages for services allegedly performed as a railroad employee, nor confer jurisdiction upon this Court.

Archer, Greiner, Hunter & Read, Attorneys for Defendant;
By /s/ F. Morse Archer, Jr., A Member of the Firm.

[fol.9]

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION TO DISMISS

Take notice that on May 17, 1957, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel may be heard, the undersigned attorneys for the defendant, will apply to the United States District Court, District of New Jersey, for an order dismissing the action, because the Court lacks jurisdiction of the subject matter. In support of the motion, the undersigned will rely upon (1) the certified copies of Awards 18115, 18116 and 18117 of the First Division, National Railroad Adjustment Board, denying claims under Regulation 4-O-2, which is the contract provision relied upon by the plaintiff in the instant matter; (2) the opinion by this Court filed herein September 19, 1956, and the Order subsequently entered and filed herein September 28, 1956.

Take further notice that at said time and place the defendant will renew its motion for summary judgment filed

October 6, 1955, the disposition of which was stayed by the above mentioned Order.

Archer, Greiner, Hunter & Read, Attorneys for Defendant, By /s/ F. Morse Archer, Jr., A Member of the Firm, 518 Market Street, Camden 1, New Jersey.

[fol. 10]

ATTACHMENT TO NOTICE OF MOTION
TO DISMISS—AWARDS

AWARD 18115

National Railroad Adjustment Board
First Division

State of Illinois)
County of Cook)

I, J. M. MacLeod, Executive Secretary, First Division, National Railroad Adjustment Board, do hereby certify that I am custodian of the records of the First Division of said Board, that I have compared the attached document with the original on file and of record in my office, and that the attached document is a true and correct copy of the original Form 1 represent Award 18115 in Docket 28988.

/s/ J. M. MacLeod
Executive Secretary, First Division
National Railroad Adjustment Board

State of Illinois)
County of Cook)

I, Margaret J. Smith, a Notary Public, do hereby certify that J. M. MacLeod, personally known to be the same person whose name is subscribed to the foregoing certificate, appeared before me this day in person and acknowledged that he signed the said certificate as his free and voluntary act.

Given under my hand and seal this 22nd day of April, 1957.

/s/ Margaret J. Smith
Notary Public

My commission expires the 12th day of August 1958.

(Seal)

[fol. 11]

National Railroad Adjustment Board
First Division

With Referee Mortimer Stone

Award 18115
Docket 28988

Parties to Dispute

Thomas J. Finlin

The Pennsylvania Railroad Company (Philadelphia
Region).

Statement of Claim:

The claim is in behalf of Thomas J. Finlin for an additional day's compensation when regularly assigned yard engine crews were used beyond their switching limits and road crews were available to have performed the service, and no emergency existed.

Findings:

The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

Claimant was regularly assigned as engineman in yard switching. He claims an extra day at his yard rate for each occasion named on the ground that he left the switching limits of his employer and entered upon the tracks of the Baltimore and Ohio Railroad Company. Claimant

grounds his claim on Regulation 4-O-2 which in pertinent part provides:

"Where regularly assigned to perform service within switching limits, yard engineers shall not be used in road service beyond such switching limits when road [fol. 12] engineers are available, except in case of emergency."

There is no claim of emergency. Claimant asserts and carrier denies that road crews were available.

Carrier's Philadelphia Terminal Division was divided into six alphabetically labeled switching districts and claimant was assigned to service in Switching District "E". Carrier asserts and claimant denies that all movements involved in this claim occurred within the confines of that district. Carrier further asserts that the tracks of the Baltimore and Ohio Railroad Company, the use of which is the basis of this claim are part of a joint railroad built by the City of Philadelphia, this carrier, and the Baltimore and Ohio Railroad Company under a "South Philadelphia Improvement Agreement" of March 23, 1914 and amendments, supplemented by city ordinances of Philadelphia; that such tracks, under the provisions of that agreement, were to be operated as a joint railroad and constitute an open gateway to the piers and industries along its line for the traffic of all roads entering the city, and that such joint railroad, including main, passing, and industrial tracks and other facilities should be at all times impartially operated so that all users should be accorded equal facilities. To support those assertions carrier set out in its submission the pertinent paragraphs of said agreement.

While claimant denies that the tracks here involved are part of a joint railroad he does not deny the existence of such joint railroad or of the agreement for its construction and operation but only disclaims knowledge of the agreement and asserts that neither he nor the Brotherhood of Locomotive Engineers were parties thereto.

[fol. 13] Claimant cites no rule of the schedule agreement requiring that any employee or employee organization be

party to such agreements and no other reason is suggested why a carrier may not acquire right for the operation of its trains and the use of its employes over the tracks involved by such agreement as well as by exclusive ownership and control.

Neither in his Statement of Claim nor by statement of facts and supporting data provided for in the Railway Labor Act does claimant define the factual situation on which he bases his "position" that on the occasions listed he "left the switching limits of the railroad company by which he is employed and entered upon the tracks of the Baltimore and Ohio Railroad Company". Consequently the specific theory of his claim is obscure.

If the claim is based on the contention that he was used outside the territorial limits of his assignment, he has shown no facts to support the claim and, in view of carrier's assertion that all movements involved in the claim occurred within the territory of Switching District "E", claimant's simple denial cannot support a sustaining award.

If claim is based on the contention that claimant was used on tracks which were separately owned and operated by the Baltimore and Ohio Railroad Company and so foreign to his assignment even though included within its territorial limits, again no supporting facts were submitted or asserted except by general denial of the paragraph in which carrier asserted that the tracks involved were part of the joint railroad. He has failed to establish such claim.

If claim is based on the contention that even under such joint agreement for building and operating as shown by carrier the tracks to which the Baltimore and Ohio Rail- [fol. 14] road Company holds legal title are foreign tracks to Pennsylvania Railroad crews and therefore outside their switching limits, claimant has cited no rules apparently supporting such contention. The rules upon which he relies have been in effect in principle since 1921 and there have since been several revisions of the agreement. Claimant does not deny carrier's assertion that before and ever since 1921 yard engineers of the same status of claimant

have daily performed the work in question yet no change has been made or sought in the pertinent rules. Such long practice and acceptance of service on jointly controlled tracks show construction of the agreement on the property as permitting it. Moreover, several awards of this Division in disputes involving similar agreements and schedules have denied similar claims.

Claimant asserts that carrier has compromised claims under similar contracts with other employes but no facts are presented as to such settlements, and even if like situations were involved carrier is not necessarily obligated to allow the present claim. A compromise is not an admission by either party thereto.

Under any theory of the claim before us Regulation 4-O-2 on which claimant relies relates, and applies to the use of yard engines in road service. Claimant relies on Award 7986 as interpreting Regulation 4-O-2. The work there involved was road service and the penalty assessed for using yard enginemen in such service was a day's pay at road rate. The work involved in the present claim was yard work, whether or not within the limits of his assignment, and the penalty sought is pay at yard rate. Further, Regulation 4-O-2 limits such road service only when road crews are available. Against carrier's denial claimant asserts that road crews were available; but they could be available only for road work and only on tracks properly used by Pennsylvania crews.

[fol: 15] Regulation 4-O-2 does not apply to a situation such as that before us and does not support the claim.

Award: Claim denied.

National Railroad Adjustment Board
By Order of First Division

Attest: J. M. MacLeod,

Executive Secretary

/s/ J.M.M.

Dated at Chicago, Illinois
This 15th day of March 1957.

[fol. 16]

AWARD 18116

National Railroad Adjustment Board
First Division

State of Illinois)
County of Cook)

I, J. M. MacLeod, Executive Secretary, First Division, National Railroad Adjustment Board, do hereby certify that I am custodian of the records of the First Division of said Board, that I have compared the attached document with the original on file and of record in my office, and that the attached document is a true and correct copy of the original Form 1 representing Award 18116 in Docket 28989.

/s/ J. M. MacLeod
Executive Secretary, First Division
National Railroad Adjustment Board

State of Illinois)
County of Cook)

I, Margaret J. Smith, a Notary Public, do hereby certify that J. M. MacLeod, personally known to be the same person whose name is subscribed to the foregoing certificate, appeared before me this day in person and acknowledged that he signed the said certificate as his free and voluntary act.

Given under my hand and seal this 22nd day of April, 1957.

/s/ Margaret J. Smith
Notary Public

My commission expires the 12th day of August 1958.

(Seal)

[fol. 17]

National Railroad Adjustment Board
First Division

With Referee Mortimer Stone

Award 18116

Docket 28989

Parties to Dispute

Charles H. Hogentogler

The Pennsylvania Railroad Company (Philadelphia
Region)

Statement of Claim:

The claim is in behalf of Charles H. Hogentogler for an additional day's compensation when regularly assigned yard engine crews were used beyond their switching limits and road crews were available to have performed the service, and no emergency existed.

Findings:

The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

Claimant was regularly assigned as engineman in yard switching. He claims an extra day at his yard rate for each occasion listed on the ground that he left the switching limits of his employer and entered upon the tracks of the Baltimore and Ohio Railroad Company, the Philadelphia Belt Line Railroad Company, and the Reading Company.

Essentially the claim presented here is identical to that in Docket 28988 determined in Award 18115 announced on this date, except that in addition to switching in District [fol. 18] "E" claimant here on occasion served in District "A" where he was used also on tracks, title to which was held by the Reading Company and by the Philadel-

phia Belt Line Railroad Company, claimed by carrier to be within Switching District "A". The latter company was a non-operating company.

As to such tracks, carrier asserts that all movements were over tracks jointly built and equally owned by carrier and the Reading Company, with all tracks accessible to the handling of cars by either in accordance with an ordinance of May 21, 1877 of the City of Philadelphia, the pertinent part of which is set out, and agreements of July 1, 1881 and May 1, 1882 between the predecessors in interest of said companies, except for one track, title to which is held by the Philadelphia Belt Line Railroad Company; that said track was constructed under agreement between carrier and the Reading Company providing that it should be operated in the interest of the parties and under such regulations as should give to each party equal rights with the other and equal dispatch with the other.

Claimant denies the paragraph of carrier's submission concerning the Reading tracks. As to the Philadelphia Belt Line track, he disclaims knowledge of the agreement relied on and asserts that neither he nor the Brotherhood of Locomotive Engineers was a party thereto. We think decision here should be controlled by that on Docket 28988.

Award: Claim denied.

National Railroad Adjustment Board
By Order of First Division

/Attest: J. M. MacLeod, /s/ J.M.M.
Executive Secretary

Dated at Chicago, Illinois.

This 15th day of March 1937.

[fol. 19]

AWARD 18117

**National Railroad Adjustment Board
First Division**

State of Illinois)
County of Cook)

I, J. M. MacLeod, Executive Secretary, First Division, National Railroad Adjustment Board, do hereby certify that I am custodian of the records of the First Division of said Board, that I have compared the attached document with the original on file and of record in my office, and that the attached document is a true and correct copy of the original Form 1 representing Award 18117 in Docket 28900.

/s/ J. M. MacLeod
Executive Secretary, First Division
National Railroad Adjustment Board

State of Illinois)
County of Cook)

I, Margaret J. Smith, a Notary Public, do hereby certify that J. M. MacLeod, personally known to be the same person whose name is subscribed to the foregoing certificate, appeared before me this day in person and acknowledged that he signed the said certificate as his free and voluntary act.

Given under my hand and seal this 22nd day of April, 1957.

/s/ Margaret J. Smith
Notary Public

My commission expires the 12th day of August 1958.

(Seal)

[fol. 20]

National Railroad Adjustment Board
First Division

With Referee Mortimer Stone

Award 18117
Docket 28990

Parties to Dispute

Darrell L. Middleton

The Pennsylvania Railroad Company (Philadelphia
Region)

Statement of Claim:

The claim is in behalf of Darrell L. Middleton for an additional day's compensation when yard engine crews were used beyond their switching limits and road crews were available to have performed the service, and no emergency existed.

Findings:

The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

The situation and claim here presented are substantially identical to those involved in Docket 28989 which resulted in Award 18116. The only apparent distinction is that claimant here was assigned from the extra board while claimant there held a regular assignment.

We think like award should follow.

Award: Claim denied.

National Railroad Adjustment Board
By Order of First Division

Attest: J. M. MacLeod;

Executive Secretary

Dated at Chicago, Illinois.

This 15th day of March 1957.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

OPINION

Appearances:

For Plaintiff: Powell & Davis, Esquires, By James M. Davis, Jr., Esquire.

For Defendant: Archer, Greiner, Hunter & Read, Esquires, By F. Morse Archer, Jr., Esquire.

MADDEN, District Judge:

On April 11, 1955, Charles A. DePriest filed a complaint in this court alleging that he had been employed as a locomotive engineer by the defendant, The Pennsylvania Railroad Company, from May 13, 1918 until March 10, 1955, when he retired. He further alleged that on March 1, 1941 the defendant-railroad company and the Baltimore and Eastern Railroad Company, as employers, and the Brotherhood of Locomotive Engineers, a labor union, had entered into an agreement for the benefit of locomotive engineers employed by the two railroads in both yard and road service, of which DePriest was one, which provided, among other things, that if an engineer employed by the defendant operated a train over the trackage of a foreign railroad other than in an emergency, he performed a road service which entitled him to one day's pay in addition to the day's compensation to which he was entitled for services on the road of his employer. DePriest claimed that between February 1, 1948, when he was assigned to yard service, and the time of his retirement, he had performed services on between 1000 and 1500 occasions on the trackage of the Baltimore and Ohio Railroad which entitled him to compensation in the sum of \$27,000. He alleged that his claims were denied by the defendant and that due to his retirement, the National Railroad Adjustment Board had no jurisdiction of the matter and [fol. 23] he accordingly was asserting his claims in this action in this court.

The defendant moved to dismiss the action for lack of jurisdiction and in support of its motion filed an affidavit alleging that claims for additional wages under the same agreement had been filed against it before the First Division of the National Railroad Adjustment Board where they were presently awaiting decision. The motion to dismiss was denied with leave to the defendant to request a reasonable stay of the trial of this action pending determination of like issues between other claimants and the defendant then before the National Railroad Adjustment Board. Defendant filed answer and then moved for summary judgment on the ground that administrative remedies had not been exhausted or, in the alternative, sought an order staying all proceedings pending a decision by the National Railroad Adjustment Board interpreting the basic agreement involved in the case.

This court after hearing the motions held, in an opinion filed September 19, 1956, 145 F. Supp. 596, that the action involved the construction of a contract between a railroad employer and a labor union which under the provisions of the Railway Labor Act¹ was exclusively for determination by the National Railroad Adjustment Board, a requirement not affected by DePriest's voluntary retirement, and that DePriest, although not a party to the claims pending before the Board, would be a person affected by any order of the Board in the matter, upon which an action could be maintained in the District Court, citing Kirby v. Penna. R. R. Co. (3 Cir. 1951) 188 F. 2d 793. On September 28, 1956 an order was entered by this court in conformity with its opinion retaining jurisdiction of the matter but staying all proceedings until the Board decided the cases presently before it involving [fol. 24] the same provisions of the contract in suit. DePriest appealed this order and pending the appeal DePriest died on February 11, 1957 and his administrator has been substituted as plaintiff.

—On April 17, 1957, the Court of Appeals (for this Circuit) through Judge Maris, filed an opinion, 243 F. 2d 485, holding that the order of September 28, 1956 was not

¹ 45 U. S. C. A. Section 151, et seq.

appealable and the appeal would be dismissed but, likewise, suggesting to this court that upon plaintiff's application it might be well to modify the stay provisions of the order so that all pre-trial preparations might be completed and the matter ready for trial in the event of favorable disposition by the National Railroad Adjustment Board.

Immediately both plaintiff and defendant moved by appropriate motions before the court, the plaintiff for a modification of the stay order, the defendant on a motion to dismiss. The defendant's motion to dismiss was bot-tomed upon this court's previous opinion in the matter, together with the determination in Awards 18115, 18116 and 18117 of the First Division National Railroad Ad-justment Board, which determinations were made March 15, 1957 (after argument before the Court of Appeals in this matter but before determination).

Inasmuch as this court had filed an opinion in another matter involving the question of jurisdiction between the courts and the National Railroad Adjustment Board; Re: Belford Barnett, plaintiff, v. Pennsylvania-Reading Sea-shore Lines, respondent, 145 F. Supp. 731, and that such matter had, likewise, been appealed to the Court of Ap-peals, and that argument had been had thereon on April 17, 1957, the court adjourned the matter until disposition of the Barnett matter by the Court of Appeals.

On May 28, 1957, the Court of Appeals, through Judge Goodrich, filed an opinion in the Barnett matter, supra, and these motions were then argued before this court on [fol. 25] June 7, 1957.

An examination of defendant's motion discloses certified copies of the awards in three cases, all claims against the Pennsylvania Railroad Company, in the one, award 18115, Thomas J. Finlin, in the second, award 18116, and in the third, award 18117, all having in issue the inter-pretation of the very contract and the same factual circum-stances involved in the present case, so we are confronted directly with the issue: Under these circumstances, does the National Railroad Adjustment Board have exclusive jurisdiction for the interpretation of the contract?

In its previous opinion in this matter, 145 F. Supp. 596, this court said:

"If the interpretation of the pending matters on this question by the administrative body is against the claimants thereunder, is it binding upon this Court in the present matter? We think so, under the authority of the Slocum case, *supra*, and *Newman v. Baltimore and Ohio Railroad Co.*, 3rd Cir. 1951, 191 F. 2d. 560."

If the present status of the law on this subject is the same, this statement would seem dispositive of the matter, at the same time the court is reluctant to take its own statement as sole authority for so holding.

In the DePriest case (*Day v. Penn. R. R. Co.*) *supra*, Judge Maris said:

" * * * On the contrary the stay here was sought merely because of the rule of law laid down by the Supreme Court in *Slocum v. Delaware L. & W. R. Co.*, 1950, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795, and *Order of Railway Conductors of America v. Southern Railway Co.*, 1950, 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811, that the National Railroad Adjustment Board has exclusive jurisdiction to decide the question raised in this case as to the construction [fol. 26] of the labor agreement here sued on."

And further:

" * * * Nor can we ignore the fact *that even if the plaintiff's right is established by the board* the amount of the claim at least may well have to be established in the present action in the district court. We, therefore, think it not inappropriate to suggest that the district court, upon plaintiff's application, may well be moved to modify the existing stay of proceedings to the extent necessary to permit the parties to undertake depositions, discovery and other pre-trial procedure in order that the evidence which is now available may be preserved for *use at the trial of the action when and if it takes place.*" (Emphasis supplied)

To this court this at the very least creates an inference that Judge Maris was of a mind that the determination by the National Railroad Adjustment Board if it was against the position of the present plaintiff, was final.

In *Barnett v. Pennsylvania-Reading Seashore Lines*, supra, Judge Goodrich said:

“ * * * A legislative policy permitting court re-examination of monetary awards but no review in cases where no award is made is not a matter for us to question unless it violates constitutional rights. This statutory scheme does not.

“The view just expressed, that there can be no judicial review when the Board rails to give relief to an employee, is that of other courts which have had occasion to examine the question. Sometimes the conclusion is put on the basis that the statute giving the Board's order finality means what it says. No review is provided for and that is the end of it. [fol. 27] *Reynolds v. Denver & R. G. W. R. Co.*, 174 F. 2d 673 (10th Cir. 1949); *Weaver v. Pennsylvania R. R.*, 141 F. Supp. 214 (S. D. N. Y. 1956); *Greenwood v. Atchison, T. & S. F. Ry.*, 129 F. Supp. 105 (S. D. Cal. 1955); *Futhey v. Atchison, T. & S. F. Ry.*, 96 F. Supp. 864 (N. D. Ill. 1951); and *Berryman v. Pullman Co.*, 48 F. Supp. 542, 543 (W. D. Mo. 1942), where the court said: ‘That finding is made final by the statute. There is no room for a subsequent inquiry into the same question by the Courts.’ Occasionally res judicata is given as the reason. *Ramsey v. Chesapeake & O. R. Co.*, 75 F. Supp. 740 (N. D. Ohio 1948). Other decisions put the result squarely upon the election of remedies theory. Plaintiff having chosen to go to the Board, he cannot now, after losing, come to a court. *Majors v. Thompson*, 235 F. 2d 449 (5th Cir. 1956); *Michel v. Louisville & N. R. Co.*, 188 F. 2d 224 (5th Cir.), cert. denied, 342 U. S. 862 (1951); cf. *Kelly v. Nashville, C. & St. L. Ry.*, 75 F. Supp. 737 (E. D. Tenn. 1948) (court action brought while proceedings were pending before the Board).

"Regardless of the path taken judicial authority arrives at the same place. The cases which preserve the possibility of court review if the Board has acted unconstitutionally or has gone outside its jurisdiction should be kept in mind. But they are not in point in this case which is a plain challenge to the decision reached by the Board on the merits of the plaintiff's claim."

This view seems also to be the opinion of the Fifth Circuit for in the matter of *Sigfred v. Pan American World Airways*, 1956, 230 F. 2d 13, Judge Tuttle, speaking of the National Railroad Adjustment Board and the National Air Transport Adjustment Board, said at page 17:

[fol. 28] "In the light of the declared aims of the Act, we also find it to be the intent of Congress to allow the parties to make the awards of such boards final and binding. Therefore, giving normal effect to these words, we refuse to review a challenged ruling of law, there being no question raised regarding the jurisdiction of the board or the regularity of its proceeding.

"However, it was urged upon the district court that the system board's construction of the agreement is arbitrary and capricious. If we regard this as an assertion that the board's arbitrariness rose to the level of a denial of due process, it is not amiss to add that we regard the board's interpretation of the agreement not only entirely reasonable, but we believe it to be the correct interpretation."

And further (page 18):

"The interpretation of such an agreement was held by the *Slocum* case to be within the exclusive jurisdiction of the statutory board there involved."

It is, therefore, the opinion of this court that the National Railroad Adjustment Board had the contract in question in the present case before it for interpretation in like circumstances; that the present plaintiff did not necessarily have to appear before such Board under the holding

of Kirby v. Pennsylvania R. R., supra; and that the question of interpretation of the labor agreement was exclusively in the National Railroad Adjustment Board and its finding is final and binding upon the plaintiff in this case.

Consequently, the defendant's motion to dismiss will be granted and it, therefore, becomes unnecessary to consider the motion of plaintiff to modify the stay.

Counsel will prepare an appropriate order.

[fol. 29]

IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL—Filed September 12, 1957

This cause coming on for hearing on defendant, The Pennsylvania Railroad Company's Motion to dismiss the action because the Court lacks jurisdiction over the subject matter of the Complaint, and the Court having heard the argument of counsel and being fully advised and having filed a written opinion herein September 5, 1957, it is

Ordered that the defendant's Motion to dismiss the action be granted because the Court lacks jurisdiction over the subject matter of the Complaint and that the Complaint be and it is hereby dismissed without costs.

/s/ Thomas M. Madden, United States District Court Judge.

Dated: Sept. 12th, 1957.

Approved as to form: Powell & Davis, Esquires, Attorneys for Plaintiff, By /s/ James M. Davis, Jr., A Member of the Firm.

[fol. 30]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

To the Clerk of the United States District Court for the District of New Jersey, and Archer, Greiner, Hunter and Read, Esqs., Attorneys of the Defendant:

Please Take Notice that George M. Day, Administrator ad litem of the Estate of Charles A. DePriest, deceased,

the plaintiff above named, respectfully appeals from the whole of an order entered by this court and in this cause on September 12, 1957, dismissing this action and from the judgment entered thereon dismissing the action, to the United States Court of Appeals for the Third Circuit.

Powell and Davis, Attorneys for Plaintiff, By James M. Davis, Jr., A Member of the Firm.

[fol. 31]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,462

GEORGE M. DAY, Administrator Ad Litem of the Estate
of Charles A. De Priest, Plaintiff-Appellant,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
Defendant-Appellee.

Appeal from Order of the United States District Court
for the District of New Jersey Dismissing Civil Action
at No. 356-55.

Appendix for Appellee

[fol. 32]

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION TO DISMISS—Filed May 3, 1955

To: Powell and Davis, Esqs., 110 High Street, Mt. Holly,
New Jersey, Attorneys for Plaintiff:

Take notice that on May 20, 1955 at 10:00 in the forenoon, or as soon thereafter as counsel may be heard, the undersigned attorneys for the defendant will apply to the United States District Court, District of New Jersey, Post

Office Building, Camden, New Jersey, for an order dismissing the action, because that Court lacks jurisdiction of the subject matter of said action. In support of the motion, the undersigned will rely upon the following:

(1) This action involves the construction of a contract between a railroad employer and a labor union, and under the provisions of the Railway Labor Act, the National Railroad Adjustment Board has exclusive jurisdiction of said action.

(2) The application by plaintiff for an annuity under the Railroad Retirement Act and his voluntary relinquishment of the right to return to service did not deprive the National Railroad Adjustment Board of its exclusive jurisdiction over the subject matter of this claim for wages for services allegedly performed as a railroad employee.

The affidavit and certified material annexed hereto will be relied upon in support of the motion.

Archer, Greiner, Hunter & Read, Attorneys for Defendant, By /s/ F. Morse Archer, Jr., 1201 Wilson Building, Camden, New Jersey.

[fol. 33]

AFFIDAVIT OF H. D. KRUGGEL IN SUPPORT OF MOTION—
Filed May 3, 1955

Commonwealth of Pennsylvania,
County of Philadelphia, ss.:

I, H. D. Kruggel, being first duly sworn according to law do say that I am Superintendent of the Philadelphia Terminal Division of The Pennsylvania Railroad Company and have immediate charge of the operation of said division.

1. In my official capacity as Superintendent of the Philadelphia Terminal Division of The Pennsylvania Railroad Company I have received from Mr. Charles A. DePriest a letter dated March 11, 1955, advising me that Mr. DePriest had applied for an annuity under the Railroad Retirement Act, and that he relinquished all rights to return to service as of March 11, 1955.

2. Said retirement was purely voluntary on the part of Mr. DePriest and was not required by any rule or requirement of the Pennsylvania Railroad Company.

3. It is also within my knowledge that claims for alleged additional wages due, which are similar to those now being advanced by Mr. DePriest, were filed against this Company by two former Philadelphia Terminal Division engineers by the name of John J. Manning and Charles E. Freehoff. After death of said Manning and Freehoff, their wage claims were progressed by the Administrator and Administratrix, respectively, of their estates, to the First Division [fol. 34] of the National Railroad Adjustment Board. These two claims have been docketed by the said First Division and are now awaiting decision.

H. D. KRUGGEL.

Sworn to and subscribed before me this 2nd day of May, 1955.

(Seal)

HARRY W. REED,
Notary Public.
Philadelphia, Philadelphia County, Penna.

My Commission Expires January 7, 1959.

NATIONAL RAILROAD ADJUSTMENT BOARD
First Division
AWARD 15406

State of Illinois)
County of Cook)

I, J. M. MacLeod, Executive Secretary, First Division, National Railroad Adjustment Board, do hereby certify that I am custodian of the records of the First Division of said Board, and that I have compared the attached document with the original on file and of record in my office, and certify that the attached document is a true and correct copy of the original Award 15406 in Docket 23270.

J. M. MACLEOD
Executive Secretary, First Division
National Railroad Adjustment Board

[fol. 35]

State of Illinois)

County of Cook)

I, Margaret J. Smith, a Notary Public, do hereby certify that J. M. MacLeod, personally known to be the same person whose name is subscribed to the foregoing certificate, appeared before me this day in person and acknowledged that he signed the said certificate as his free and voluntary act.

Given under my hand and seal this 27th day of April, 1955.

MARGARET J. SMITH,
Notary Public.

My Commission Expires the 12th day of August, 1958:

Award F5406
Docket 23270

NATIONAL RAILROAD ADJUSTMENT BOARD

FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois
Conductors-Trainmen Supplemental Board, with
Referee Mortimer Stone

PARTIES TO DISPUTE:

ORDER OF RAILWAY CONDUCTORS

BROTHERHOOD OF RAILROAD TRAINMEN

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of G. E. Knight for pay for time lost as Conductor, NO&NE Railroad, during [fol. 36] period May 15, 1944, to March 15, 1946, alleging he was improperly held out of service during this period. (Claimant being sixty-five years of age and having submitted resignation and been granted annuity under Railroad Retirement Act effective March 15, 1946, is not requesting reinstatement to service.)

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe

within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

Claimant was charged with improper conduct while on duty as conductor on May 8, 1944. He was taken out of service and ordered to report for investigation on May 17th. On that date Superintendent Logan told claimant that he believed the charges against him and urged him to retire since he was over sixty-five years of age. Claimant asked that the investigation proceed at once and Superintendent Logan insisted on postponing action until May 20th to avoid embarrassment to the eighteen year old girl complainant and to give claimant time to consider retirement. On May 19th the Local Chairman delivered to Superintendent Logan request that the appointment for the 20th be postponed with statement that "will possibly give you a date tomorrow". Nothing further was done until June 8 when demand was made of Superintendent Logan for reinstatement of claimant because he was held out of service without investigation within five days. Ten days thereafter the Superintendent replied asking claimant to set a date for investigation and, that not being done, on July 10th he set July 14th as date of investigation. The same date was set for investigation of another charge of misconduct on duty on [fol. 37] May 24th, of which charge claimant had been advised on June 21st. When claimant did not appear neither investigation was attempted and the matters lay dormant until October 30 when both were again set for November 6, and on that date witnesses were examined, without appearance by claimant, and he was found guilty by Superintendent Logan and dismissed from service.

As to the first charge, claimant's guilt had already been determined by Superintendent Logan without hearing and claimant was thereby deprived of his right to a fair and impartial investigation before him.

As to both charges the rule requires investigation within five days if possible. It is the duty of carrier, not the accused, to set the time for investigation and to hold them within five days or as promptly as reasonably possible thereafter. We find here no waiver of prompt hearing and

no proper grounds for the long delay in formal investigations.

AWARD: Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FIRST DIVISION

ATTEST: (Signed) J. M. MacLEOD
Executive Secretary

Dated at Chicago, Illinois, this 12th day of May, 1952.

[fol. 38]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO DISMISS—Filed June 6, 1955

This matter being opened to the Court by F. Morse Archer, Jr., Esq., of Archer, Greiner, Hunter and Read, Esqs., Attorneys of the Defendant, in the presence of James M. Davis, Jr., Esq., of Powell and Davis, Esqs., Attorneys of the Plaintiff, and the defendant having moved to dismiss the plaintiff's complaint on the ground that this Court lacks jurisdiction in this suit; and the Court having heard and considered the arguments of counsel for both parties and having read and considered the briefs filed in connection therewith; and good cause appearing;

It is, on this 6th day of June, 1955, on motion of James M. Davis, Jr., Esq., one of the attorneys of the plaintiff Ordered that the motion of the defendant to dismiss the complaint filed herein be and the same is hereby denied and an exception is granted to the defendant.

And it is further Ordered that the defendant shall have the right to ask for a reasonable stay of the trial of this cause pending determination of like issues between other claimants and the defendant now pending in the National Railroad Adjustment Board, Division 1, and an exception is hereby granted to the plaintiff.

Thomas M. Madden, J.

32
[fol. 39]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,462

GEORGE M. DAY, ADMINISTRATOR AD LITEM OF THE ESTATE OF
CHARLES A. DePRIEST, Plaintiff-Appellant,

v.

PENNSYLVANIA RAILROAD CO.

Appeal From the United States District Court
For the District of New Jersey

Argued April 1, 1958

Before KALODNER and HASTIE, Circuit Judges and
LAYTON, District Judge.

OPINION OF THE COURT—Filed August 12, 1958

By KALODNER, Circuit Judge:

The substituted plaintiff appeals from an Order entered against him in the District Court dismissing the complaint originally filed by his decedent.

Details of the action, proceedings, and contentions of the parties are set forth in prior opinions of the District Court and this Court¹ as well as in 155 F. Supp. 695, which immediately preceded this appeal.

Briefly stated, Charles A. DePriest commenced this action for damages against the defendant railroad assert-
[fol. 40] ing that pursuant to a collective bargaining agree-
ment, and during his employment by the defendant railroad

¹ DePriest v. Pennsylvania R. Co., 145 F. Supp. 596, appeal dismissed, sub nom. Day v. Pennsylvania R. Co., 243 F.2d 485 (1957).

as a locomotive engineer, he was entitled to compensation greater than that actually paid to him. The complaint recited that DePriest had processed his claim through the defendant's organization, but did not proceed to the National Railroad Adjustment Board because he retired and severed his employment relationship. Although defendant's answer denied that DePriest's claim was administratively rejected by its general manager, it admitted that he was an employee in the period involved and averred that he relinquished all rights to return to service and had applied for his annuity.

Following our dismissal, for want of appellate jurisdiction, of the prior appeal of the decedent, 243 F.2d 485, the plaintiff moved to modify the stay order entered by the District Court. The defendant moved to dismiss the complaint on the ground that the court lacked jurisdiction of the subject matter. In support of the motion, defendant attached certified copies of three Awards made by the National Railroad Adjustment Board, First Division, in independent matters, all involving interpretation of the contract here involved with respect to the same issue. These Awards denied relief to the claimants; they were entered by the Board shortly before we rendered our decision on the prior appeal.

The District Court determined that the issue involved was one of interpretation of a collective bargaining agreement; that the question of interpretation was exclusively for the National Railroad Adjustment Board and that its finding was final and binding upon the plaintiff. 155 F. Supp. 695. Although the Opinion of the District Court proceeded upon an inquiry into the binding effect of the aforementioned Awards, which would presuppose jurisdiction, the Order actually entered dismissed the complaint for want of jurisdiction.

[fol. 41] The questions now presented for disposition are whether the cause was within the jurisdiction of the District Court, and, if it was, whether the plaintiff is barred by the Awards submitted in support of defendant's motion.

We are of the opinion that the District Court was not without jurisdiction in the premises and that, at this stage

of the action, it does not appear that the plaintiff is or should be barred from further proceedings.

There is no dispute here that the requirements of an ordinary diversity action are met. If the District Court is deprived of jurisdiction, that must appear from the provisions of the Railway Labor Act, 48 Stat. 1185, c. 691, 45 U.S.C. Section 151, et seq.

The term "employee" is defined in Section 1 Fifth of the Act, 45 U.S.C. Section 151 Fifth, to include "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner or rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission. . . ." Further, Section 3 First(i) of the Act, 45 U.S.C. Section 153 First(i), grants to the National Railroad Adjustment Board jurisdiction to hold hearings, make findings, and enter awards in all disputes between carriers and their employees "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . ."

In this statutory framework, the United States Supreme Court permitted an employee who claimed to have been wrongfully discharged to maintain an action at law without resort to the Adjustment Board even though a question of interpreting a bargaining agreement was presented. *Moore v. Illinois Central R. Co.*, 312 U.S. 630 (1941). The Court there said at page 634:

"[We] find nothing in that [Railway Labor] Act which purports to take away from the courts the jurisdiction [fol. 42] to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court."

In *Slocum v. Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950), the railroad, having a dispute with two unions concerning the scope of their respective agreements, commenced an action for declaratory judgment, praying for an interpretation of both agreements. The Supreme Court emphasized the declared purpose of the Railway Labor Act, and noted that settlement of the dispute "would have pro-

spective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties." 339 U.S. at page 242. Accordingly, it held that the jurisdiction conferred upon the Adjustment Board was exclusive, and that the Courts were without power to adjudicate such a dispute.

As to the Moore decision, the Court pointed out:

"Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we held there, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board." 339 U.S. at page 244.

[fol. 43] In the light of these decisions, the courts have consistently drawn a distinction between those cases in which the employee, having been discharged, accepts his discharge, and those in which he seeks a judicial interpretation of a collective bargaining agreement and enforcement of his employment rights in such manner as to affect future relations between the railroad and other employees. For example, see *Newman v. Baltimore & Ohio R. Co.*, 191 F.2d 560 (3rd Cir. 1951); *Switchmen's Union of North America v. Ogden Union Ry. & Depot Co.*, 209 F.2d 419 (10th Cir. 1954), cert. den. 347 U.S. 989; *Alabaugh v. Baltimore & Ohio R. Co.*, 222 F.2d 861 (4th Cir. 1955), cert. den. 350 U.S. 839; *Majors v. Thompson*, 235 F.2d 449 (5th Cir. 1956).

The Railway Labor Act relates to disputes between employees and carriers. Its broad purposes are set forth in the *Slocum* decision:

"The first declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.' . . . This purpose extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements. . . . The plan of the Act is to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes. Carriers are therefore required to negotiate with bargaining representatives of the employees. . . . The Act also sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail.

"In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties. This type of grievance has long been [fol. 44] considered a potent cause of friction leading to strikes. It was to prevent such friction that the [May 20] 1926 Act provided for creation of various Adjustment Boards . . . But this voluntary machinery proved unsatisfactory, and in 1934 Congress . . . passed an amendment . . . The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements . . . Precedents established by it [the Adjustment Board] while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems." 339 U.S., pages 242-243.

As already indicated, it was precisely along these lines that the *Moore* case was distinguished.

Here, as in the Moore case, the employer-employee relationship has been terminated; the substantive issue is whether something is owing to the plaintiff. While the court may have to consider a provision of a bargaining agreement, its interpretation would have no binding effect upon future interpretations by the Board, and the future relations between the carrier and its other employees are not involved. Since the claimant in the Moore, or in the instant, situation, is not an employee, there does not exist the unhappy discontent among co-employees because of dissimilar treatment for similar work.

We see no reason to distinguish between this situation and one to recover for wrongful discharge.² *Cepero v. [fol. 45] Pan American Airways*, 195 F.2d 453, 455 (1st Cir. 1952), cert. den. 344 U.S. 840.

We reach, then, the issue discussed by the District Court in its Opinion, that is, whether the plaintiff is bound by the separate awards of the Adjustment Board denying the independent claims of three employees with respect to a similar substantive issue.

The effect of the motion of the defendant in this regard is that of a motion for summary judgment, and upon clearly settled principles such motion may be granted only where no material issue of fact exists and the moving party is entitled to judgment as a matter of law. Rules 12(b) and 56, Federal Rules of Civil Procedure.³

In support of its motion, the defendant has attached certified copies of the three Awards upon which it relies.

² In *Sigfred v. Pan American World Airways*, 230 F.2d 13, 18 (5th Cir. 1956), the plaintiff had submitted his claim to the Adjustment Board, which denied it. The Court held that no reviewable question of law was presented with respect thereto. As to the jurisdiction of the Court, see the dissenting Opinion of Judge Brown, 230 F.2d 19, 22-23.

However, in the case sub judice we are not presented with a similar situation. Rather, we are concerned with the issue, whether the jurisdiction of the Board is exclusive with respect to a controversy not yet submitted to it.

³ *Lawlor v. National Screen Service Corporation*, 238 F.2d 59, 65 (3rd Cir. 1956), cert. granted, judgment vacated (on other grounds) 352 U.S. 992 (1957); *Sherwin v. Oil City National Bank*, 229 F.2d 835, 837 (3rd Cir. 1956); *Frederick Hart & Co. v. Record-graph Corporation*, 169 F.2d 580, 581 (3rd Cir. 1948).

But these do not show that the plaintiff or his decedent was a party to any of them, or that either received due notice. Indeed, the recitation in the Awards of the parties to the proceedings does not include the plaintiff or the decedent. It is difficult to see that on such a presentation the defendant should be entitled to summary judgment in its favor. *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945).

The District Court relied upon our decisions in *Kirby v. Pennsylvania R.R. Co.*, 188 F.2d 793 (1951), *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F.2d 579 (1957), and the decision on the prior appeal in this case, 243 F.2d 485 (1957). However, the Kirby case involved the right of an employee to take advantage of an Award against a carrier where he was able to demonstrate that he was a member of the class for whose benefit the Award was made. The Barnett case involved the finality of an Award in a proceeding to which the employee-plaintiff was [fol. 46] a party. Neither case involved or disposed of the issue presented here. The prior appeal in this case was dismissed because the Order of the District Court, which stayed the action pending disposition of the three proceedings above referred to by the Board, was interlocutory and not appealable. We did suggest, 243 F.2d at page 487, that the District Court might permit discovery and other pre-trial proceedings, since "even if the plaintiff's right is established by the Board the amount of the claim at least may well have to be established in the present action in the District Court." This was consistent with the Kirby case but even then merely assumes the plaintiff might bring himself within its operation. Our decision does not hold, and does not suggest, that a negative Award, in a proceeding to which the claimant is not a party and of which he does not receive notice, is binding upon him.

This does not mean that the Board's interpretation of the collective bargaining agreement should be ignored or taken lightly. Justice Rutledge put the matter in useful perspective in *Washington Terminal Co. v. Boswell*, 124 F.2d 235, 241 (D.C. Cir. 1941), where he said:

"The whole adjustment procedure up to the point of award, findings and order by the Board, appears

to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed; therefore, that the findings have [fol. 47] no substantive effect, merely because they were not given finality, as to either facts or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony."

For the reasons stated, the Order of the District Court will be vacated and the cause remanded for further proceedings not inconsistent herewith.

[fol. 48]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12462

GEORGE M. DAY, Administrator ad litem of the Estate
of Charles A. DePriest, Appellant,

vs.

PENNSYLVANIA RAILROAD CO.

On Appeal From the United States District Court
For the District of New Jersey

Present: KALODNER and HASTIE, Circuit Judges and
LAYTON, District Judge.

JUDGMENT—August 12, 1958

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby vacated and the cause remanded for further proceedings not inconsistent with the opinion of this Court, with costs.

[fol. 49] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 50]

IN THE SUPREME COURT OF THE UNITED STATES

No. 397, October Term, 1958

ORDER ALLOWING CERTIORARI—November 10, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SEP 24 1958

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States
October Term, 1958.

No. **39**

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

v.

**GEORGE M. DAY, Administrator ad Litem of the Estate
of Charles A. DePriest,**

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT.**

**F. MORSE ARCHER, JR.,
JOHN P. HAUCH, JR.,
ARCHER, GREINER, HUNTER & READ,
518 Market Street,
Camden, New Jersey,
JOHN B. PRIZER,
RICHARD N. CLATTENBURG,
HERMON M. WELLS,
6 Penn Center Plaza,
Philadelphia, Pennsylvania,
Counsel for Petitioner.**

September 24, 1958.

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Switchmen's Union v. Ogden Union Ry., 209 F. 2d 419 (10 Cir.), cert. den. 347 U. S. 989	12
Walters v. Chicago & North Western Ry., 216 F. 2d 332 (7 Cir.)	12

STATUTES:

28 U. S. C. §1254 (1)	2
Railway Labor Act, 45 U. S. C. §§151, 152, 153	3, 7, 32

MISCELLANEOUS:

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IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1958.

No.

PENNSYLVANIA RAILROAD COMPANY,
Petitioner.

v.

GEORGE M. DAY, Administrator ad Litem of the Estate of
Charles A. DePriest,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT.**

Petitioner prays that a writ of certiorari issue to review
the judgment of the United States Court of Appeals for
the Third Circuit, entered in the above entitled case on
August 12, 1958.

CITATION TO OPINIONS BELOW.

The opinion of the District Court, printed as Appendix A hereto (*infra*, p. 15), is reported at 155 F. Supp. 695. The opinion of the Court of Appeals, printed as Appendix B hereto (*infra*, p. 23), is not yet officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 12, 1958. This petition for writ of certiorari was filed less than 90 days after the entry of the judgment below. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1).

QUESTION PRESENTED.

Does a District Court of the United States have jurisdiction over the subject matter of a claim for extra pay for services performed as a railroad employee, in a dispute arising under an existing collectively bargained railway labor agreement, solely because the claim is presented by an employee who has left active service; or is exclusive jurisdiction over such claim and dispute in the National Railroad Adjustment Board established under the Railway Labor Act?

STATUTES INVOLVED.

Pertinent provisions of the Railway Labor Act, 45 U. S. C., Secs. 151, 151a, 152, 153, are set forth in Appendix C to this petition, p. 32, infra.

STATEMENT OF THE CASE.

On April 11, 1955, respondent's decedent, Charles A. DePriest, a New Jersey resident, filed a complaint in the United States District Court for New Jersey against the petitioner, a Pennsylvania corporation, alleging that he had been employed by the petitioner from May 13, 1918, until March 10, 1955, at which time he resigned and applied for his annuity.

It was alleged that on March 1, 1941, the petitioner and the Baltimore and Eastern Railroad Company, as employers, and the Brotherhood of Locomotive Engineers, a labor union, had entered into an agreement for the benefit of locomotive engineers employed by the two railroads in both yard and road service, of which DePriest was one (R. 1-2). The agreement provided, inter alia, that:

"4-0-2. (a) Where regularly assigned to perform service within switching limits, yard engineers shall not be used in road service beyond such switching limits when road engineers are available, except in case of emergency. When yard engineers are used in road service beyond their switching limits under the conditions just referred to, they shall be paid miles or hours, whichever is greater, with a minimum of one

hour, for the class of road service performed beyond their switching limits, in addition to their regular day's pay and without any deduction therefrom for the time consumed in said service." (R. 2).

DePriest claimed that between February 1, 1948, and the time of his retirement he had performed road service outside his switching limits on between 1,000 and 1,500 occasions on the trackage of the Baltimore and Ohio Railroad on the Delaware River Waterfront which entitled him to compensation in the sum of \$27,000 under his interpretation of the railway labor agreement aforesaid (R. 3-4). Under petitioner's interpretation of the contract DePriest did not go beyond his switching limits on such occasions and did not perform road service (R. 7).

DePriest also alleged that his claims were denied by the petitioner and that upon the occurrence of his retirement the National Railroad Adjustment Board had no jurisdiction of the matter and he accordingly was asserting his claims in this action in the District Court (R. 4).

Petitioner moved to dismiss the action for lack of jurisdiction over the subject matter and in support of its motion filed an affidavit stating that claims for alleged additional wages due similar to those being advanced by DePriest were filed against petitioner by two engineers, which after their death, were progressed by their administrators to the First Division of the National Railroad Adjustment Board where they were docketed and awaiting decision (R. 31-32). Petitioner also filed in support of the motion a certified copy of an award of the National Railroad Adjustment Board, First Division, wherein the Board took jurisdiction over a pay claim by a retired employee (R. 34-36). The motion to dismiss was denied with leave to the petitioner to request a reasonable stay of the trial pending determination of like issues between the other claim-

ants and the petitioner then before the National Railroad Adjustment Board (R. 37). The petitioner then filed its answer generally denying DePriest's claims and asserting eight defenses thereto, including the defenses that the Court was without jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted (R. 6).

Petitioner then moved for summary judgment on the ground that administrative remedies had not been exhausted or in the alternative sought an order staying proceedings pending a decision by the National Railroad Adjustment Board interpreting the basic agreement involved in this action (Appendix A, *infra*, pp. 16-17).

The District Court, after hearing the motions held that the action involved the construction of a contract between a railroad employer and a labor union which, under the provisions of the Railway Labor Act, was exclusively for determination by the National Railroad Adjustment Board, a requirement not affected by DePriest's voluntary retirement, and that "the interpretation of the contract here will affect working conditions of present employees and may lead to labor strife, the very type of friction the National Railway Labor Act was designed to prevent." 145 F. Supp. 596, 599. On September 28, 1956, an order was entered by the District Court staying all proceedings until the Board decided the cases before it involving the same provisions of the contract in suit (Appendix A, *infra*, p. 17). DePriest appealed from this order to the United States Court of Appeals for the Third Circuit. DePriest died on February 11, 1957, and his administrator was substituted as plaintiff-appellant in the action. The Court of Appeals dismissed the appeal for want of appellate jurisdiction. 243 F. 2d 485. After argument in the Court of Appeals in this matter, but before the decision to dismiss the appeal for want of appellate jurisdiction, the National Railroad

Adjustment Board, First Division, made three awards denying claims in matters involving the interpretation of the contract here involved with respect to the same issue.

Petitioner then again moved the District Court to dismiss the complaint on the ground that the Court lacked jurisdiction of the subject matter (R. 9). In support of the motion petitioner attached certified copies of the three awards of the Board to which reference is above made (R. 10-21).

The District Court determined that the issue involved was one of interpretation of a collective bargaining railway labor agreement and that the question of interpretation was exclusively for the National Railroad Adjustment Board, 155 F. Supp. 695; Appendix A, p. 15, *infra*. The District Court then entered an order dismissing the complaint for want of jurisdiction over the subject matter (R. 29).

The Court of Appeals for the Third Circuit in the decision appealed from here vacated this order of the District Court and remanded the case for further proceedings. Appendix B, p. 31, *infra*: It held that the requirements of an ordinary diversity action were met and that the Railway Labor Act did not deprive the District Court of jurisdiction over a claim by a retired employee for additional compensation based on his interpretation of an existing collectively bargained railway labor agreement. It relied upon the authority of *Moore v. Illinois Central R. Co.*, 312 U. S. 630 (1941), which involved a common law action for wrongful discharge. The Court of Appeals said: "We see no reason to distinguish between this situation and one to recover for wrongful discharge." Thus, the District Court was held to have jurisdiction of this claim for extra pay, which is based on the interpretation of a railway labor agreement.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals for the Third Circuit in this case has decided an important question of federal law involving the Railway Labor Act in a way in conflict with the principles established by the decisions of this Court in *Railroad Trainmen v. Chicago River R. R.*, 353 U. S. 30 (1957); *State of California v. Taylor*, 353 U. S. 553 (1957); and *Order of Railway Conductors of America v. Southern Railway Co.*, 339 U. S. 255 (1950). Fundamentally, this question and conflict involves whether or not a claim for additional compensation for services as a railroad employee, based on the interpretation of a railroad collective bargaining agreement, is within the jurisdiction of the courts or is within the exclusive jurisdiction of the National Railroad Adjustment Board established under the Railway Labor Act.

In the *Railroad Trainmen*, *State of California* and *Order of Railway Conductors* cases, this Court held that under the Railway Labor Act the National Railroad Adjustment Board has exclusive jurisdiction of disputes which involve claims for additional compensation under railroad collective bargaining agreements. In the *Railroad Trainmen* case this Court reviewed the legislative history of the Railway Labor Act and held that it was generally understood that the provisions dealing with the Adjustment Board, 45 U. S. C. §153, First, "were to be considered as compulsory arbitration in this limited field". 353 U. S. 30, 39. In the *State of California* case this Court held that the Adjustment Board "was given jurisdiction over 'minor disputes', meaning those involving the interpretation of collective-bargaining agreements in a particular set of facts" and characterized Section 153, First, as "compulsory arbitra-

tion". 353 U. S. 553, 558, 559. This established doctrine was not followed, nor even mentioned, by the lower court in its opinion.

Instead, Judge Kalodner in writing the opinion below, relied heavily upon the authority of *Moore v. Illinois Central R. Co.*, 312 U. S. 630 (1941), in which a discharged employee was permitted to bring a common law action for wrongful discharge in court without resort to the Adjustment Board. The court below extended what it conceived to be the holding of the *Moore* case to cover the instant matter. It said it saw no reason to distinguish between a common law action for wrongful discharge and a claim for additional compensation under a collective bargaining agreement, where the claim was brought by a retired employee. This, despite the limitations on the scope of the decision in the *Moore* case and the clearly established distinction drawn by this Court in *Slocum v. Delaware L. and W. R. Co.*, 339 U. S. 239, 244 (1950), that "a common law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide". In the instant case, manifestly the Board has power to provide a complete remedy.

However, though not perceiving any distinction here, the court below did recognize that in the light of this Court's decision in the *Slocum* case, "the courts have consistently drawn a distinction between those cases in which the employee, having been discharged, accepts his discharge, and those in which he seeks a judicial interpretation of a collective bargaining agreement and enforcement of his employment rights in such manner as to affect future relations between the railroad and other employees". It is submitted that the court below erred in its holding that the instant dispute did not fall in the latter category.

The failure of the Court below to distinguish this claim for additional compensation under a collective bargaining

agreement, which is within the jurisdiction of the National Railroad Adjustment Board, from an action for wrongful discharge, and its holding that the District Court has jurisdiction of such claim, create an unwarranted exception to the doctrine established by this Court that the courts have no jurisdiction over those matters which Congress has committed to the jurisdiction of the National Railroad Adjustment Board.

The existence of this conflict in principle between the decisions of this Court and the court below warrants the grant of a writ of certiorari to resolve this important question involving the Railway Labor Act and the jurisdiction of the courts.

2. Clearly the dispute presented here involves an important question concerning the interpretation and application of the Railway Labor Act, particularly since the decision of the court below throws confusion into the administration of the statute by both the carriers in the industry and their employees.

The decision of the Court below allows an action in the federal courts which is inconsistent with the orderly procedure provided by Section 3, First, of the Railway Labor Act for the National Railroad Adjustment Board to determine disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" From the legislative history of Section 3, First, it is certain that the Adjustment Board was created to compel disputes over the interpretation of agreements such as presented by the respondent here, if processed beyond the carrier, to be taken exclusively to the Adjustment Board, absent a system board. To permit the jurisdiction of a federal district court to be invoked to decide a dispute as to the meaning of a wage provision of a railroad collective bargaining

agreement is to invade the exclusive jurisdiction over disputes of that type which Congress gave to the Adjustment Board. The position adopted by the court below rejects the basic assumption of the Railway Labor Act that disputes over the meaning of railroad collective bargaining agreements should be settled exclusively within the confines of the structures erected by the Act. It opens the door to conflicting interpretations of such agreements by the Adjustment Board on one hand and a variety of courts on the other, thereby dooming the uniformity, intended by Congress, which is attainable only within the statutory procedures. It would also lead to an unseemly race between parties in an effort respectively to choose the forum of their own selection.

Moreover, the decision below is not confined in its reach to pay-claims under existing agreements by retired employees.¹ The language used by the court would seemingly justify invoking the jurisdiction of a court whenever the active employer-employee relationship no longer existed, even though the dispute concerned rates of pay, rules or working conditions under the collective bargaining agreement. Such situations might involve claims by inactive employees on furlough, out of service because of illness or disability, absent in military service, voluntarily resigning, or out of active service for any other reason. Either the out of service employee or the Railroad might go into court to get an interpretation of the agreement. A veritable Pandora's box would thereby be opened, throwing into federal district courts or, for that matter, state courts,

¹ This class alone is large. In 1956-1957 retired railroad employees receiving benefits under the Railroad Retirement Act totaled 361,000, as reported in the Annual Report (p. 1) of the Railroad Retirement Board for the fiscal year ended June 30, 1957, H. R. Doc. No. 278, 85th Cong., 2d Sess. 1 (1958). Many employees at retirement have claims or grievances pending against their employers.

a host of issues arising out of the disputed application and interpretation of collective bargaining agreements. Here again the basic and vital provision of the Act—the exclusiveness of the Act's procedures—would be grossly violated.

A claim for additional compensation by an employee who, subsequent to the completion of the incident out of which the claim arose, relinquishes his right to service, falls within the Act and must be brought before the Adjustment Board and cannot be taken in the first instance to any court in the land happening to have jurisdiction over the person of the defendant. In such a situation the Adjustment Board can give exactly the same remedy as a court. This was not true in the *Moore* case.

The holding of the court below leads to the conclusion that any railroad employee by retiring or resigning could by-pass the Adjustment Board and thus defeat and avoid the plan established by the Congress and confuse other employees having similar claims who are required to go before the Adjustment Board. Such an unrealistic approach would seem to do extreme violence to the announced plan of the Railway Labor Act to provide a procedure for interpreting labor contracts and settling disputes which would avoid those serious disruptions between carriers and employees often leading to strikes.

In addition, the decision of the court below that a retired employee may bring in court a wage claim based upon an existing collective bargaining agreement is at war with the established construction given the Railway Labor Act by the National Railroad Adjustment Board under which it has jurisdiction over pay-claims submitted by retired railroad employees. While the lower court did not specifically decide whether the National Railroad Ad-

² See, e. g., National Railroad Adjustment Board, First Division, Award 15406 (R. 34-36).

justment Board had concurrent jurisdiction with the courts or whether the courts alone had jurisdiction over claims by out-of-service employees, the opinion strongly implies that the latter view governed the decision. Such a holding would, of course, deprive retired and other out-of-service employees of the Adjustment Board remedy provided by the Railway Labor Act, and in view of the new limits on the diversity jurisdiction of the Federal courts as a practical matter would relegate most such claims to the state courts. The assumption of jurisdiction by the court below on any theory, if sustained, would make the administration of collective bargaining agreements in the whole railroad industry chaotic. This confusion is not only detrimental to the best interests of the carriers and their employees but is apt to cause disputes to develop into strikes, thereby hurting the general public and producing the evil which Congress sought to avoid. Since the decision below creates important and unwarranted exceptions to Section 3, First, review by this Court is essential.

3. The decision of the court below is believed to be in conflict with the principles upheld in the following decisions of the Courts of Appeal for the Fifth, Seventh and Tenth Circuits, which have held that where the dispute concerns a wage provision of a collective bargaining agreement made pursuant to the Railway Labor Act and can be resolved by an interpretation of the agreement, exclusive jurisdiction lies in the National Railroad Adjustment Board. *Sigfred v. Pan American Airways*, 230 F. 2d 13 (5 Cir. 1956), cert. den., 351 U. S. 925; *Buster v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 195 F. 2d 73 (7 Cir. 1952); *Walters v. Chicago & North Western Ry.*, 216 F. 2d 332 (7 Cir. 1954); *Switchmen's Union v. Ogden Union Ry.*, 209 F. 2d 419 (10 Cir. 1954), cert. den., 347 U. S. 989.

From numerous decisions in the federal district courts

and in the courts of appeal in the different circuits it is apparent that the exclusive jurisdiction of the Adjustment Board is determined by the nature of the claim or dispute arising under a collective bargaining agreement and by the status of the claimant at the time the incident arose. The court below in failing to recognize this distinction as the basis for the *Moore* case did not look at the nature of the claim nor the status of the plaintiff at the time the incidents occurred but only the status of the plaintiff after his voluntary retirement.

It is further submitted that the court below erred in relying upon the authority of the decision of the Court of Appeals for the First Circuit in *Cepero v. Pan American Airways*, 195 F. 2d 453 (1952), cert. den., 344 U. S. 840, rehearing den. 344 U. S. 882. The basic issue in the *Cepero* case was the validity, as distinguished from the interpretation, of a collective bargaining agreement, and the judgment of the district court dismissing the complaint was affirmed by the First Circuit with only the reservation that the lower court could inquire into a wrongful discharge issue if it felt justice so required. Thus, the *Cepero* case is clearly distinguishable from the instant matter, where neither the validity of a collective bargaining agreement nor an issue of wrongful discharge is involved.

The need for a clarifying construction of the Railway Labor Act in this respect is further shown by a recent district court case in the Northern District of Illinois where the Court, in determining that a system board had exclusive jurisdiction over a discharge case, uses the following language: "Furthermore, there is some doubt whether the Supreme Court would now adhere to its decision in *Moore* in view of its more recent opinion in *Brotherhood of Railroad Trainmen v. Chicago R. & I. Railroad Co.*, 353 U. S. 30, rehearing denied 353 U. S. 948, in which the Court read the Adjustment Board provisions of the Railway Labor

Act as constituting compulsory arbitration." See *Rossa v. Flying Tiger Line*, 42 Lab. Rel. Rep. (Ref. Man.) 2652 (N. D. Ill., June 26, 1958, not yet officially reported). The volume of the litigation in the district courts involving this area of the Railway Labor Act is a silent but powerful indication of the need to have the question raised by the decision of the court below reviewed at this time by this Court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

F. MORSE ARCHER, JR.,
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September 24, 1958.

APPENDIX A.**OPINION OF COURT.**

(Filed September 5, 1957.)

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

**GEORGE M. DAY, Administrator ad litem of the Estate of
Charles A. DePriest, deceased,**

Plaintiff,

v.

**THE PENNSYLVANIA RAILROAD COMPANY,
Defendant.**

APPEARANCES:

For Plaintiff: **POWELL & DAVIS, Esquires, By JAMES
M. DAVIS, JR., Esquire.**

For Defendant: **ARCHER, GREINER, HUNTER &
READ, Esquires, By F. MORSE ARCHER, JR., Es-
quire.**

MADDEN, District Judge:

On April 11, 1955, Charles A. DePriest filed a complaint in this court alleging that he had been employed as a locomotive engineer by the defendant, The Pennsylvania Railroad Company, from May 13, 1918 until March 10, 1955, when he retired. He further alleged that on March 1, 1941

the defendant-railroad company and the Baltimore and Eastern Railroad Company, as employers, and the Brotherhood of Locomotive Engineers, a labor union, had entered into an agreement for the benefit of locomotive engineers employed by the two railroads in both yard and road service, of which DePriest was one, which provided, among other things, that if an engineer employed by the defendant operated a train over the trackage of a foreign railroad other than in an emergency, he performed a road service which entitled him to one day's pay in addition to the day's compensation to which he was entitled for services on the road of his employer. DePriest claimed that between February 1, 1948, when he was assigned to yard service, and the time of his retirement, he had performed services on between 1000 and 1500 occasions on the trackage of the Baltimore and Ohio Railroad which entitled him to compensation in the sum of \$27,000. He alleged that his claims were denied by the defendant and that due to his retirement, the National Railroad Adjustment Board had no jurisdiction of the matter and he accordingly was asserting his claims in this action in this court.

The defendant moved to dismiss the action for lack of jurisdiction and in support of its motion filed an affidavit alleging that claims for additional wages under the same agreement had been filed against it before the First Division of the National Railroad Adjustment Board where they were presently awaiting decision. The motion to dismiss was denied with leave to the defendant to request a reasonable stay of the trial of this action pending determination of like issues between other claimants and the defendant then before the National Railroad Adjustment Board. Defendant filed answer and then moved for summary judgment on the ground that administrative remedies had not been exhausted or, in the alternative, sought an order staying all proceedings pending a decision by the National Rail-

road Adjustment Board interpreting the basic agreement involved in the case.

This court after hearing the motions held, in an opinion filed September 19, 1956, 145 F. Supp. 596, that the action involved the construction of a contract between a railroad employer and a labor union which under the provisions of the Railway Labor Act¹ was exclusively for determination by the National Railroad Adjustment Board, a requirement not affected by DePriest's voluntary retirement, and that DePriest, although not a party to the claims pending before the Board, would be a person affected by any order of the Board in the matter, upon which an action could be maintained in the District Court, citing Kirby v. Penna. R. R. Co. (3 Cir. 1951) 188 F. 2d 793. On September 28, 1956 an order was entered by this court in conformity with its opinion retaining jurisdiction of the matter but staying all proceedings until the Board decided the cases presently before it involving the same provisions of the contract in suit. DePriest appealed this order and pending the appeal DePriest died on February 11, 1957 and his administrator has been substituted as plaintiff.

On April 17, 1957, the Court of Appeals (for this Circuit) through Judge Maris, filed an opinion, 243 F. 2d 485, holding that the order of September 28, 1956 was not appealable and the appeal would be dismissed but, likewise, suggesting to this court that upon plaintiff's application it might be well to modify the stay provisions of the order so that all pre-trial preparations might be completed and the matter ready for trial in the event of favorable disposition by the National Railroad Adjustment Board.

Immediately both plaintiff and defendant moved by appropriate motions before the court, the plaintiff for a modification of the stay order, the defendant on a motion to dis-

¹ 45 U. S. C. A., Section 151, et seq.

miss. The defendant's motion to dismiss was bottomed upon this court's previous opinion in the matter, together with the determination in Awards 18115, 18116 and 18117 of the First Division National Railroad Adjustment Board, which determinations were made March 15, 1957 (after argument before the Court of Appeals in this matter but before determination).

Inasmuch as this court had filed an opinion in another matter involving the question of jurisdiction between the courts and the National Railroad Adjustment Board; *Re: Belford Barnett, plaintiff v. Pennsylvania-Reading Seashore Lines, respondent*, 145 F. Supp. 731, and that such matter had, likewise, been appealed to the Court of Appeals, and that argument had been had thereon on April 17, 1957, the court adjourned the matter until disposition of the Barnett matter by the Court of Appeals.

On May 28, 1957, the Court of Appeals, through Judge Goodrich, filed an opinion in the Barnett matter, *supra*, and these motions were then argued before this court on June 7, 1957.

An examination of defendant's motion discloses certified copies of the awards in three cases, all claims against the Pennsylvania Railroad Company, in the one, award 18115, Thomas J. Finlin, in the second, award 18116, and in the third, award 18117, all having in issue the interpretation of the very contract and the same factual circumstances involved in the present case, so we are confronted directly with the issue: Under these circumstances, does the National Railroad Adjustment Board have exclusive jurisdiction for the interpretation of the contract?

In its previous opinion in this matter, 145 F. Supp. 596, this court said:

"If the interpretation of the pending matters on this question by the administrative body is against the

claimants thereunder, is it binding upon this Court in the present matter? We think so, under the authority of the Slocum case, *supra*, and *Newman v. Baltimore and Ohio Railroad Co.*, 3rd Cir. 1951, 191 F. 2d 560."

If the present status of the law on this subject is the same, this statement would seem dispositive of the matter, at the same time the court is reluctant to take its own statement as sole authority for so holding.

In the DePriest case (*Day v. Penna. R. R. Co.*) *supra*, Judge Maris said:

" * * * On the contrary the stay here was sought merely because of the rule of law laid down by the Supreme Court in *Slocum v. Delaware L. & W. R. Co.*, 1950, 339 U. S. 239, 70 S. Ct. 577, 94 L. Ed. 795, and *Order of Railway Conductors of America v. Southern Railway Co.*, 1950, 339 U. S. 255, 70 S. Ct. 585, 94 L. Ed. 811, that the National Railroad Adjustment Board has exclusive jurisdiction to decide the question raised in this case as to the construction of the labor agreement here sued on."

And further:

" * * * Nor can we ignore the fact that even if the plaintiff's right is established by the board the amount of the claim at least may well have to be established in the present action in the district court. We, therefore, think it not inappropriate to suggest that the district court, upon plaintiff's application, may well be moved to modify the existing stay of proceedings to the extent necessary to permit the parties to undertake depositions, discovery and other pre-trial procedure in order that the evidence which is now available may be preserved for use at the trial of the action when and if it takes place." (Emphasis supplied.)

To this court this at the very least creates an inference that Judge Maris was of a mind that the determination by the National Railroad Adjustment Board if it was against the position of the present plaintiff, was final.

In *Barnett v. Pennsylvania-Reading Seashore Lines*, supra, Judge Goodrich said:

"* * * A legislative policy permitting court re-examination of monetary awards but no review in cases where no award is made is not a matter for us to question unless it violates constitutional rights. This statutory scheme does not.

"The view just expressed, that there can be no judicial review when the Board fails to give relief to an employee, is that of other courts which have had occasion to examine the question. Sometimes the conclusion is put on the basis that the statute giving the Board's order finality means what it says. No review is provided for and that is the end of it. *Reynolds v. Denver & R. G. W. R. Co.*, 174 F. 2d 673 (10th Cir. 1949); *Weaver v. Pennsylvania R. R.*, 141 F. Supp. 214 (S. D. N. Y. 1956); *Greenwood v. Atchison, T. & S. F. Ry.*, 129 F. Supp. 105 (S. D. Cal. 1955); *Futhey v. Atchison, T. & S. F. Ry.*, 96 F. Supp. 864 (N. D. Ill. 1951); and *Berryman v. Pullman Co.*, 48 F. Supp. 542, 543 (W. D. Mo. 1942), where the court said: 'That finding is made final by the statute. There is no room for a subsequent inquiry into the same question by the Courts.' Occasionally, *res judicata* is given as the reason. *Ramsey v. Chesapeake & O. R. Co.*, 75 F. Supp. 740 (N. D. Ohio 1948). Other decisions put the result squarely upon the election of remedies theory. Plaintiff having chosen to go to the Board, he cannot now, after losing, come to a court. *Majors v. Thompson*, 235 F. 2d 449 (5th Cir. 1956); *Michel v. Louisville & N. R.*

Co., 188 F. 2d 224 (5th Cir.), cert. denied, 342 U. S. 862 (1951); cf. Kelly v. Nashville, C. & St. L. Ry., 75 F. Supp. 737 (E. D. Tenn. 1948) (court action brought while proceedings were pending before the Board).

"Regardless of the path taken judicial authority arrives at the same place. The cases which preserve the possibility of court review if the Board has acted unconstitutionally or has gone outside its jurisdiction should be kept in mind. But they are not in point in this case which is a plain challenge to the decision reached by the Board on the merits of the plaintiff's claim."

This view seems also to be the opinion of the Fifth Circuit for in the matter of Sigfred v. Pan American World Airways, 1956, 230 F. 2d 13, Judge Tuttle, speaking of the National Railroad Adjustment Board and the National Air Transport Adjustment Board, said at page 17:

"In the light of the declared aims of the Act, we also find it to be the intent of Congress to allow the parties to make the awards of such boards final and binding. Therefore, giving normal effect to these words, we refuse to review a challenged ruling of law, there being no question raised regarding the jurisdiction of the board or the regularity of its proceeding.

"However, it was urged upon the district court that the system board's construction of the agreement is arbitrary and capricious. If we regard this as an assertion that the board's arbitrariness rose to the level of a denial of due process, it is not amiss to add that we regard the board's interpretation of the agreement not only entirely reasonable, but we believe it to be the correct interpretation."

And further (page 18):

"The interpretation of such an agreement was held by the Slocum case to be within the exclusive jurisdiction of the statutory board there involved."

It is, therefore, the opinion of this court that the National Railroad Adjustment Board had the contract in question in the present case before it for interpretation in like circumstances; that the present plaintiff did not necessarily have to appear before such Board under the holding of Kirby v. Pennsylvania R. R., supra; and that the question of interpretation of the labor agreement was exclusively in the National Railroad Adjustment Board and its finding is final and binding upon the plaintiff in this case.

Consequently, the defendant's motion to dismiss will be granted and it, therefore, becomes unnecessary to consider the motion of plaintiff to modify the stay.

Counsel will prepare an appropriate order.

APPENDIX B.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 12,462—October Term, 1957.

(Argued April 1, 1958.

Decided August 12, 1958.)

GEORGE M. DAY, Administrator, ad Litem of the Estate
of Charles A. DePriest,

Plaintiff-Appellant,

v.

PENNSYLVANIA RAILROAD CO.

Before: KALODNER and HASTIE, Circuit Judges and
LAYTON, District Judge.

By KALODNER, Circuit Judge:

The substituted plaintiff appeals from an Order entered against him in the District Court dismissing the complaint originally filed by his decedent.

Details of the action, proceedings, and contentions of the parties are set forth in prior opinions of the District Court and this Court¹ as well as in 155 F. Supp. 695, which immediately preceded this appeal.

Briefly stated, Charles A. DePriest commenced this action for damages against the defendant railroad asserting that pursuant to a collective bargaining agreement, and during his employment by the defendant railroad as a locomotive engineer, he was entitled to compensation greater than that actually paid to him. The complaint recited that DePriest had processed his claim through the defendant's organization, but did not proceed to the National Railroad Adjustment Board because he retired and severed his employment relationship. Although defendant's answer denied that DePriest's claim was administratively rejected by its general manager, it admitted that he was an employee in the period involved and averred that he relinquished all rights to return to service and had applied for his annuity.

Following our dismissal, for want of appellate jurisdiction, of the prior appeal of the decedent, 243 F. 2d 485, the plaintiff moved to modify the stay order entered by the District Court. The defendant moved to dismiss the complaint on the ground that the court lacked jurisdiction of the subject matter. In support of the motion, defendant attached certified copies of three Awards made by the National Railroad Adjustment Board, First Division, in independent matters, all involving interpretation of the contract here involved with respect to the same issue. These Awards denied relief to the claimants; they were entered by the Board shortly before we rendered our decision on the prior appeal.

The District Court determined that the issue involved

¹ **DePriest v. Pennsylvania R. Co.**, 145 F. Supp. 596, appeal dismissed, sub nom. **Day v. Pennsylvania R. Co.**, 243 F. 2d 485 (1957).

was one of interpretation of a collective bargaining agreement; that the question of interpretation was exclusively for the National Railroad Adjustment Board and that its finding was final and binding upon the plaintiff. 155 F. Supp. 695. Although the Opinion of the District Court proceeded upon an inquiry into the binding effect of the aforementioned Awards, which would presuppose jurisdiction, the Order actually entered dismissed the complaint for want of jurisdiction.

The questions now presented for disposition are whether the cause was within the jurisdiction of the District Court, and, if it was, whether the plaintiff is barred by the Awards submitted in support of defendant's motion.

We are of the opinion that the District Court was not without jurisdiction in the premises and that, at this stage of the action, it does not appear that the plaintiff is or should be barred from further proceedings.

There is no dispute here that the requirements of an ordinary diversity action are met. If the District Court is deprived of jurisdiction, that must appear from the provisions of the Railway Labor Act, 48 Stat. 1185, c. 691, 45 U. S. C. Section 151, et seq.

The term "employee" is defined in Section 1 Fifth of the Act, 45 U. S. C. Section 151 Fifth, to include "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner or rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission. . . ." Further, Section 3 First (i) of the Act, 45 U. S. C. Section 153 First (i), grants to the National Railroad Adjustment Board jurisdiction to hold hearings, make findings, and enter awards in all disputes between carriers and their employees "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions. . . ."

In this statutory framework, the United States Supreme Court permitted an employee who claimed to have been wrongfully discharged to maintain an action at law without resort to the Adjustment Board even though a question of interpreting a bargaining agreement was presented. *Moore v. Illinois Central R. Co.*, 312 U. S. 630 (1941). The Court there said at page 634:

"[We] find nothing in that [Railway Labor] Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court."

In *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950), the railroad, having a dispute with two unions concerning the scope of their respective agreements, commenced an action for declaratory judgment, praying for an interpretation of both agreements. The Supreme Court emphasized the declared purpose of the Railway Labor Act, and noted that settlement of the dispute "would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties." 339 U. S. at page 242. Accordingly, it held that the jurisdiction conferred upon the Adjustment Board was exclusive, and that the courts were without power to adjudicate such a dispute.

As to the *Moore* decision, the Court pointed out:

"*Moore* was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract.

As we held there, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board." 339 U. S. at page 244.

In the light of these decisions, the courts have consistently drawn a distinction between those cases in which the employee, having been discharged, accepts his discharge, and those in which he seeks a judicial interpretation of a collective bargaining agreement and enforcement of his employment rights in such manner as to affect future relations between the railroad and other employees. For example, see *Newman v. Baltimore & Ohio R. Co.*, 191 F. 2d 560 (3rd Cir. 1951); *Switchmen's Union of North America v. Ogden Union Ry. & Depot Co.*, 209 F. 2d 419 (10th Cir. 1954), cert. den. 347 U. S. 989; *Alabaugh v. Baltimore & Ohio R. Co.*, 222 F. 2d 861 (4th Cir. 1955), cert. den. 350 U. S. 839; *Majors v. Thompson*, 235 F. 2d 449 (5th Cir. 1956).

The Railway Labor Act relates to disputes between employees and carriers. Its broad purposes are set forth in the *Slocum* decision:

"The first declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.' . . . This purpose extends both to disputes concerning the making of collective agreements and to grievances arising under existing agreements. . . . The plan of the Act is

to provide administrative methods for settling disputes before they reach acute stages that might be provocative of strikes. Carriers are therefore required to negotiate with bargaining representatives of the employees. . . The Act also sets up machinery for conciliation, mediation, arbitration and adjustment of disputes, to be invoked if negotiations fail.

"In this case the dispute concerned interpretation of an existing bargaining agreement. Its settlement would have prospective as well as retrospective importance to both the railroad and its employees, since the interpretation accepted would govern future relations of those parties. This type of grievance has long been considered a potent cause of friction leading to strikes. It was to prevent such friction that the [May 20] 1926 Act provided for creation of various Adjustment Boards . . . But this voluntary machinery proved unsatisfactory, and in 1934 Congress . . . passed an amendment . . . The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements . . . Precedents established by it [the Adjustment Board] while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems." 339 U. S., pages 242-243.

As already indicated, it was precisely along these lines that the Moore case was distinguished.

Here, as in the Moore case, the employer-employee relationship has been terminated; the substantive issue is whether something is owing to the plaintiff. While the court may have to consider a provision of a bargaining

agreement, its interpretation would have no binding effect upon future interpretations by the Board, and the future relations between the carrier and its other employees are not involved. Since the claimant in the Moore, or in the instant, situation, is not an employee, there does not exist the unhappy discontent among co-employees because of dissimilar treatment for similar work.

We see no reason to distinguish between this situation and "one to recover for wrongful discharge." *Cepero v. Pan American Airways*, 195 F. 2d 453, 455 (1st Cir. 1952), cert. den. 344 U. S. 840.

We reach, then, the issue discussed by the District Court in its Opinion, that is, whether the plaintiff is bound by the separate awards of the Adjustment Board denying the independent claims of three employees with respect to a similar substantive issue.

The effect of the motion of the defendant in this regard is that of a motion for summary judgment, and upon clearly settled principles such motion may be granted only where no material issue of fact exists and the moving party is entitled to judgment as a matter of law. Rules 12(b) and 56, Federal Rules of Civil Procedure.³

² In *Sigfred v. Pan American World Airways*, 230 F. 2d 13, 18 (5th Cir. 1956), the plaintiff had submitted his claim to the Adjustment Board, which denied it. The Court held that no reviewable question of law was presented with respect thereto. As to the jurisdiction of the Court, see the dissenting Opinion of Judge Brown, 230 F. 2d 19, 22-23.

However, in the case sub judice we are not presented with a similar situation. Rather, we are concerned with the issue, whether the jurisdiction of the Board is exclusive with respect to a controversy not yet submitted to it.

³ *Lawlor v. National Screen Service Corporation*, 238 F. 2d 59, 65 (3rd Cir. 1956), cert. granted, judgment vacated (on other grounds) 352 U. S. 992 (1957); *Sherwin v. Oil City National Bank*, 229 F. 2d 835, 837 (3rd Cir. 1956); *Frederick Hart & Co. v. Recordgraph Corporation*, 169 F. 2d 580, 581 (3rd Cir. 1948).

In support of its motion, the defendant has attached certified copies of the three Awards upon which it relies. But these do not show that the plaintiff or his decedent was a party to any of them, or that either received due notice. Indeed, the recitation in the Awards of the parties to the proceedings does not include the plaintiff or the decedent. It is difficult to see that on such a presentation the defendant should be entitled to summary judgment in its favor. *Elgin, J. & E. Ry. Co. v. Burley*, 325 U. S. 711 (1945).

The District Court relied upon our decisions in *Kirby v. Pennsylvania R. R. Co.*, 188 F. 2d 793 (1951), *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579 (1957), and the decision on the prior appeal in this case, 243 F. 2d 485 (1957). However, the Kirby case involved the right of an employee to take advantage of an Award *against* a carrier where he was able to demonstrate that he was a member of the class for whose benefit the Award was made. The Barnett case involved the finality of an Award in a proceeding to which the employee-plaintiff was a party. Neither case involved or disposed of the issue presented here. The prior appeal in this case was dismissed because the Order of the District Court, which stayed the action pending disposition of the three proceedings above referred to by the Board, was interlocutory and not appealable. We did suggest, 243 F. 2d at page 487, that the District Court might permit discovery and other pretrial proceedings, since "even if the plaintiff's right is established by the Board the amount of the claim at least may well have to be established in the present action in the District Court." This was consistent with the Kirby case but even then merely assumes the plaintiff might bring himself within its operation. Our decision does not hold, and does not suggest, that a negative Award, in a proceeding to which the claimant is not a party and of which he does not receive notice, is binding upon him.

This does not mean that the Board's interpretation of the collective bargaining agreement should be ignored or taken lightly. Justice Rutledge put the matter in useful perspective in *Washington Terminal Co. v. Boswell*, 124 F. 2d 235, 241 (D. C. Cir. 1941), where he said:

"The whole adjustment procedure up to the point of award, findings and order by the Board, appears to be constructed upon the idea that it is not the business of lawyers, but is the business of railroad men, workers and managers alike. That does not make their findings and decisions less probative; rather it should make them more so. They know the language, functions and purposes of railroads and of their collective agreements. Their judgment is informed by experience in negotiating and administering these contracts. Because of this they, perhaps better than lawyers, are qualified to interpret and apply them. Whether so or not, their judgment should carry weight when the judicial stage of controversy is reached. It cannot be assumed, therefore, that the findings have no substantive effect, merely because they were not given finality, as to either facts, or law. They are probative, not merely presumptive in value, having effect fairly comparable to that of expert testimony."

For the reasons stated, the Order of the District Court will be vacated and the cause remanded for further proceedings not inconsistent herewith.

APPENDIX C.

RELEVANT STATUTORY PROVISIONS.

Sections 1, 2 and 3 of Title I of the Railway Labor Act, as amended (48 Stat. 1185, 1186, 1189, 54 Stat. 785, 786, 64 Stat. 1238; 45 U. S. C. §§151, 151a, 152, 153) provide in part as follows:

"Section 1. When used in this Act and for the purposes of this Act—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric

power falls within the terms of this proviso. The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tippie, and the operation of equipment or facilities therefor, or in any of such activities.

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this Act.

* * *

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

"The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tippie, or the loading of coal at the tippie."

* * *

"Section 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * *

"Section 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after the approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

"(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

"(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

"(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any

original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

“(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

“(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive

from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

“(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

• “First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

“Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

“Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

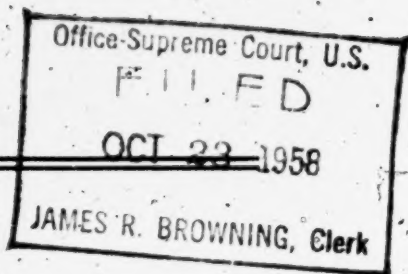
"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective, and, if the award includes

a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named.

“(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney’s fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

“(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.”

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SUPREME COURT. U. S.



IN THE
Supreme Court of the United States
October Term, 1958

No. 397

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

-VS.-

GEORGE M. DAY, Administrator ad Litem of the
Estate of Charles A. DePriest,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE
GRANTING OF A WRIT OF CERTIORARI

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Petitioner in its brief asserts three reasons why it conceives that a writ of certiorari should issue from this court in conformity with the prayer of its petition. They are:

1. The decision of the court below is in conflict with principles established by the decisions of this court.

2. The judgment of the court below throws the railway industry into confusion in the administration of the Railway Labor Act.

3. The judgment of the court below is alleged to be in conflict with principles upheld in the decisions of the Courts of Appeals for the Fifth, Seventh and Tenth Circuits.

1.

The Judgment of the Court of Appeals for the Third Circuit Sought To Be Reviewed Is Not In Conflict With the Principles Established By the Decisions of This Court.

The petitioner argues that the judgment of the United States Court of Appeals for the Third Circuit which it seeks to review is in conflict with the principles established by the decisions of this court in *Brotherhood of Railroad Trainmen v. Chicago River and Indiana R. Co.*, 353 U. S. 30, 77 S. Ct. 635 (1957), *State of California v. Taylor*, 353 U. S. 553, 77 S. Ct. 1077 (1957) and *Order of Railway Conductors v. Southern Railway Co.*, 339 U. S. 255, 70 S. Ct. 585 (1950). In this contention it is clearly mistaken.

In *Brotherhood of Railroad Trainmen v. Chicago River and Indiana R. Co.*, 353 U. S. 30, 77 S. Ct. 635, this court decided that where a "minor dispute" or grievance exists between a union of railroadmen which is the collective bargaining agent of those men and the employer with which the collective bargaining agent is authorized to deal, each party under the Railway Labor Act has the right to submit the grievance to the National Railroad Adjustment Board and that when the carrier elects to submit its dispute to the National Railroad Adjustment Board, the union can not defeat the jurisdiction of the Board by causing a strike.

In *State of California v. Taylor*, 353 U. S. 553, 77 S. Ct. 1037, this court decided that the National Railroad Adjustment Board had jurisdiction over grievances between a state-owned railroad engaging in interstate commerce and its employees. As a corollary it held that state sovereignty did not exempt a state owned railroad company engaging in interstate commerce from the jurisdiction vested in the

National Railroad Adjustment Board by the Federal Railway Labor Act.

In *Order of Railway Conductors v. Southern Railway Co.*, 339 U. S. 255, 70 S. Ct. 585, the same question was present as was raised and decided in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577 (1950). This court held in that case that a state court had no jurisdiction to determine by declaratory judgment a dispute arising between a railroad company and the collective bargaining agent of its employees which grew out of the collective bargaining agreement but that the jurisdiction over such a dispute was in the National Railroad Adjustment Board.

The decision sought to be reviewed is clearly distinguishable from these cases.

In *Order of Railway Conductors v. Southern Railway Co.*, *supra*, and *Brotherhood of Railroad Trainmen v. Chicago River and Indiana R. Co.*, *supra*, the dispute existed between a railroad company and a collective bargaining agent for its employees. In *State of California v. Taylor*, *supra*, a dispute existed between a state owned railroad company engaged in interstate commerce and the employees of that railroad. All of these disputes were clearly within the grant of jurisdiction to the National Railroad Adjustment Board by the Federal Railway Labor Act. Section 3 first of the Act (45 U. S. C. A. 153 first) after establishing the Board and providing for the selection of its membership in sub-section (g) divided the Board into four divisions, independent of each other, and prescribed the jurisdiction of each division. The Act prescribed that the First Division was "To have jurisdiction over disputes involving train and yard service employees and carriers: that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard service employees." This First Division, therefore, had jurisdiction over carriers on the one hand and generally speaking its employees who were members of train and engine crews on the other.

Congress also in Section 1 of the Act (45 U. S. C. A. 151 fifth) defined employees as follows:

"The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner and rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: provided, however, that no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission."

One other provision of the Railway Labor Act is material at this juncture. Section 3 first i provides as follows:

"The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the adjustment board with a full statement of the facts and all supporting data bearing upon the disputes."

In this case the complaint had been filed by Charles A. DePriest who was a pensioner of the Pennsylvania Railroad Company. Pending the first appeal to the United States Court of Appeals for the Third Circuit, Mr. DePriest

died and his administrator, the present plaintiff, George M. Day, was substituted as the party plaintiff. Both Mr. DePriest and Mr. Day were residents of the State of New Jersey. The defendant is a corporation of the Commonwealth of Pennsylvania and the requisite jurisdictional amount is in controversy. Therefore all of the diversity elements are present in this case. However, at the time the complaint was filed Mr. DePriest himself was not an employee of the petitioner as gauged by the statutory standard. He was no longer in the service of the carrier, he was no longer subject to its continuing authority to supervise and direct the manner and rendition of his service and he performed no work for the petitioner. In every one of the three particulars named by the Act, Mr. DePriest failed to qualify as an employee. Mr. Day in his capacity as Administrator *ad litem* of Mr. DePriest's estate also wholly fails to meet the standards of the Act. He is an officer appointed by the Superior Court of New Jersey to liquidate the assets of Mr. DePriest's estate, which this suit represents. Therefore, since DePriest was not an employee and Day is not an employee of the petitioner, they do not come within the relationship of carrier and employee which the Act makes a requisite to the jurisdiction of the National Railroad Adjustment Board, First Division.

On the contrary, in *State of California v. Taylor*, concededly the dispute was between a state owned railroad company and its employees. In *Order of Railway Conductors v. Southern Railway* and in *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company*, the dispute was between carriers on the one hand and groups of employees on the other. These three cases upon which the petitioner relies presents the relationship which Congress said must exist in order that the Board might have jurisdiction while the case under review with either the original plaintiff or the present plaintiff being considered does not present such a relationship.

Herein then is the vital difference between the two classes of cases.

The judgment below was fully supported by the holdings and rationale of *Moore v. Illinois Central Railroad Company*, 312 U. S. 630, 61 S. Ct. 554, 85 L. ed. 1089 (1941). In that case this court held that the Federal Railway Labor Act does not deprive the courts of jurisdiction to determine a controversy over a wrongful discharge or make an administrative finding a prerequisite to filing a suit in court.

In 1946 this court decided *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 66 S. Ct. 322. In that case the Order of Railway Conductors and Brotherhood of Railroad Trainmen had a dispute as to which craft should do certain work for the trustee of a railroad subject to the bankruptcy jurisdiction of the United States District Court. The Order of Railway Conductors brought this action in the reorganization court for the purpose of having the trustee direct it to apply the collective bargaining agreement in the manner desired by it. This court held that while the District Court had supervisory power to instruct its trustees with respect to their application of the collective bargaining agreement but that it had no jurisdiction to make a judgment or order that adjudicated the dispute in a manner binding on the National Railroad Adjustment Board.

Three years later and nine years after its decision in *Moore v. Illinois Central*, *supra*, this court held in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 329, 70 S. Ct. 577 (1950), that a state court had no jurisdiction to render a declaratory judgment construing a collective bargaining agreement as to which a railroad and two collective bargaining agents were in dispute, but that the jurisdiction over such a controversy raised in the National Railroad Adjustment Board.

This court was very careful in the *Slocum* case to point out in two instances that the *Moore* case on the one hand and cases of the class of *Order of Railway Conductors v. Pitney* and *Slocum v. Delaware, L. & W. R. Co.*, were not inconsistent. At page 244 of 339 U. S. and page 580 of 70 S. Ct., this court said:

"Our holding here is not inconsistent with our holding in *Moore v. Illinois Central Railroad Co.*, 312 U. S. 630, 61 S. Ct. 754, 85 L. ed. 1089. *Moore* was discharged by the railroad. He could have challenged the validity of his discharge before the board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provisions of a collective bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

And again:

"We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive. The holding of the *Moore* case does not conflict with this decision, and no contrary inference should be drawn from any language in the *Moore* opinion. * * *"

In the immediate foregoing quotations in addition to emphasizing that there is a distinction between the line of cases headed by *Moore v. Illinois Central* and those in the line headed by *Order of Railway Conductors v. Pitney*, this court was careful to show that a discharged employee had his choice of remedies. He could continue to assert his employee status and apply to the Board for reinstatement.

ment, in which case the relationship of carrier and employee, prescribed by the statute, would exist. On the contrary, if he chose to accept his discharge as final, as Moore did, he thereby ceased to be an employee and the common law courts could then provide him his remedy, the Board no longer having jurisdiction. The court below recognized this very distinction in that paragraph of its opinion which is the last paragraph on page 25 as it appears in Appendix B of the petitioner's petition herein. There the court called attention to the statutory definition of the term "employee" and of the grant of jurisdiction to the Board in Section 3 first i. Immediately thereafter the court below discussed the *Moore* case and the *Slocum* case and expressly quoted the above quoted language from this court's opinion in *Slocum* which showed the distinction in the two lines of cases.

In *Transcontinental and Western Air v. Koppl*, 345 U. S. 653, 660, 73 S. Ct. 906, 910 (1953), this court again quoted from and distinguished between the *Moore* case and the *Slocum* case.

The court below did no more in this case than this court itself did for at least the twelve years immediately following the decision in the *Moore* case.

Is there any significance in the fact that in the *Moore* case the plaintiff was a discharged employee, and in the present case that the plaintiff's decedent was a pensioner and that the present plaintiff is his administrator? A discharged employee has the employment relationship terminated by the unilateral action of the employer. A pensioned employee severs the employment relationship because the collective bargaining agreement permits him to do so. In both instances the employment relationship ceases to exist. The only difference is the manner in which the termination of the relationship is brought about. Measured by the statutory standard contained in Section 1 fifth, neither a discharged employee or a pensioner is in the

service of the carrier; neither is he subject to its continuing authority; the employer no longer has the right to supervise and direct the manner and rendition of their service; and they perform no work for the carrier. The situations are exactly parallel and there is no valid distinction between the two.

The decision of the lower court therefore does not depart from or violate the decision or principles established by this court but on the contrary clearly adheres to them.

2.

The Decision of the Court Below Does Not Throw Into Confusion the Administration of the Statute By Both Carriers In the Industry and Their Employees.

We think we have demonstrated under Point No. 1 that the lower court recognized and applied a distinction between two lines of cases that this court itself established and has several times reiterated. It is hardly a valid reason for the granting of a writ of certiorari that the law as applied by the courts results in confusion. If any confusion exists it exists because the carrier refuses to recognize the law as this court has declared it to be and refuses to apply the principles which this court has laid down. The railroad industry and railway labor has had the benefit of this court's decisions in *Moore*, *Order of Railway Conductors v. Pitney*, *Slocum v. Delaware, L. & W. R. Co.*, and kindred cases for many years. It can hardly be said that the industry has not had fully ample time and a sufficient number of careful declarations from this court to understand the principles which these cases established.

In the consideration of this matter one of the very early cases involving the Federal Railway Labor Act to be decided by this court should not be overlooked—*Elgin*,

E. Ry. Co. v. Burley, 325 U. S. 711, 65 S. Ct. 1282, J. L. ed. 1886 (1945), re-hearing denied and former decision adhered to in 327 U. S. 661, 66 S. Ct. 721 (1946). That case originated in the United States District Court for the Northern District of Illinois. It was a suit by Burley and other employees of the petitioner to recover damages for an alleged violation of their employment agreement. The defendant moved for a summary judgment in the District Court. This court noted at page 712 in its opinion that the District Court rendered the summary judgment for the defendant, "holding that the Board's award was a final adjudication of the claims, within the union's power to seek and the Board's to make, precluding judicial review." The District Court, therefore, had held that the plaintiffs were already concluded by an adjudication by the National Railroad Adjustment Board, the union having taken the claim to the Board. This court further noted that the Court of Appeals for the Seventh Circuit in 140 F. 2d 488, 490, had reversed the judgment of the District Court, "holding that the record presented a question of fact whether the union had been authorized by respondents to negotiate, compromise, and settle the claims." The Court of Appeals therefore held that a question of fact existed which entitled the plaintiffs to a trial of their suit for damages. This court affirmed the judgment of the Court of Appeals but pointed out that the crucial question was not merely whether the plaintiffs had authorized the union to settle their claims by agreement with the carrier and whether on the record that presented a question of fact but was whether or not the award of the National Railroad Adjustment Board was validly made. This court therefore did in fact affirm the right of an employee to sue for his wages under his contract of employment even while the relationship of employer and employee existed.

In *Ceparo v. Pan-American Airways*, 195 F. 2d 453 (1952), the Court of Appeals for the First Circuit affirmed

the right of an airline employee to sue in court for his wages stating at page 455 of its opinion that it saw no reason "why a suit to recover wages allegedly due under a collective bargaining agreement should stand on any different footing from the one to recover for discharge in violation of such a contract". This court declined to disturb this holding by a denial of certiorari, 344 U. S. 840 and by a denial of re-hearing, 344 U. S. 882.

We think it worthy of note at this juncture that a suit for wages is a common law action, one which was known at the time of the adoption of the Constitution of the United States and of Bill of Rights. We respectfully submit that the petitioner's contention if supported by a judgment of this court would result in a denial to the respondent of his right to a trial by jury guaranteed to him by the Seventh Amendment and that that construction of the Railway Labor Act which accords to the respondent the important constitutional right to which he is clearly entitled should be preferred to one which denies him that right simply because the original claimant had been a railroad man.

3.

The Decision of the Court Below Is Not In Conflict With the Decisions of the Courts of Appeals for the Fifth, Seventh and Tenth Circuits.

The petitioner points to *Sigfred v. Pan-American Airways*, 230 F. 2d 13 (Fifth Cir. 1956) certiorari denied 351 U. S. 925, as being a decision of the United States Court of Appeals for the Fifth Circuit with which the decision of the court below is in conflict. The learned court below cited the *Sigfred* case and correctly distinguished the case.

at hand from it on the basis that the *Sigfred* case presented an attempt by Sigfred to review a decision of the National Railroad Adjustment Board to which he had submitted his claim and the decision of which Board had been adverse to him. See page 29 of petitioner's petition. The *Sigfred* case decided that the employee had no right of review in the Federal Court of an adverse decision of the National Railroad Adjustment Board. The United States Court of Appeals for the Third Circuit decided the same proposition in harmony with the Fifth Circuit in *Barnett v. Pennsylvania-Reading Seashore Lines*, 245 F. 2d 579 (1957), which it cited and distinguished in its opinion below (which discussion is to be found at page 30 of the Petitioner's petition).

Petitioner further points to *Buster v. Chicago, Milwaukee, St. Paul and Pacific R. Co.*, 195 F. 2d 73 and *Walters v. Chicago and Northwestern Railway*, 216 F. 2d 332, as decisions of the United States Court of Appeals for the Seventh Circuit with which the judgment below is in conflict.

The Court of Appeals for the Seventh Circuit in the *Buster* case appears not to have expressly cited *Moore v. Illinois Central* decided by this court but a reading of its opinion clearly discloses that it applied the principles. At page 74 of its opinion it called attention to its former decision and to the decisions of this court which hold that the District Courts of the United States have no jurisdiction of an action to restore a discharged railway employee to his position or to award him back wages. That was wholly consistent with the *Moore* case and the *Slocum* case which held that the discharged employee could make an election of his remedies, that if he desired reinstatement his remedy lay at the Board but that if he accepted his discharge as final, thereby putting beyond question the non-existence of the employer-employee relationship, he could sue in a

common law action for damages for his wrongful discharge. *Buster* had apparently attempted to assert both remedies and the Court of Appeals held that as to the discharge and the right to recover back wages due him because of his discharge the courts had no jurisdiction. The court, however, was careful to point out that diversity of citizenship existed and that the court below did have jurisdiction to entertain his action for the recovery of damages for his alleged wrongful discharge. The Court of Appeals then affirmed the action of the trial judge in dismissing the plaintiff's action on the ground that he had failed to establish on the merits of his case that his discharge was wrongful. Such a decision is wholly consistent with the decision sought here to be reviewed.

In the *Walters* case the plaintiff sought a decree reinstating her to her former position with seniority, pension, vacation and pass rights unimpaired and for \$6,000 damages. The Court of Appeals determined that the District Court had no jurisdiction of that controversy. It cited and discussed the *Moore*, *Slocum*, *Pitney* and *Koppl* cases. The result which it reached was correct under the holding of the *Moore* case. Its reasoning was identical to that of the court whose judgment is sought to be reviewed.

Switchman's Union v. Ogden Union Railway and Depot Co., 209 F. 2d 419 (C. A. 10, 1954), is a case very similar to the *Walters* case. It was a suit for injunctive relief by a union and three employees of the defendant railroad which involved compulsory reinstatement of three employees to their employment and a controversy between two unions as to whether the employees should or should not be reinstated. The court rightly decided that the controversy was one over which the National Railroad Adjustment Board had jurisdiction. It is not in conflict with the decision or reasoning of the court below but deals with one

type of remedy which a former employee has under the doctrine of the *Moore* case while the case at bar deals with the other.

There is no merit in any of the contentions of the petitioner and its petition for a writ of certiorari should be denied.

Respectfully submitted,

POWELL AND DAVIS,
Attorneys for Respondent.

By JAMES M. DAVIS, JR.

JAN 27 1959

JAMES R. ... Clerk

No. 397.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1958.

PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

vs.

**GEORGE M. DAY, Administrator ad Litem of the
Estate of Charles A. DePriest,**

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Third Circuit.

**BRIEF FOR PETITIONER, THE PENNSYLVANIA
RAILROAD COMPANY.**

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 397.

PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

vs.

GEORGE M. DAY, Administrator ad Litem of the Estate of
Charles A. DePriest,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER, THE PENNSYLVANIA
RAILROAD COMPANY.

OPINIONS BELOW.

The opinion of the United States District Court for the
District of New Jersey (R. 19) is reported at 155 F. Supp.
695.

The opinion of the United States Court of Appeals for the Third Circuit (R. 32) was handed down on August 12, 1958, and is reported at 258 F. 2d 62.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on August 12, 1958. Petitioner's petition for writ of certiorari was filed on September 24, 1958 and granted on November 10, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. §1254 (1), 62 Stat. 928.

STATUTES INVOLVED.

This suit involves Section 3, First of the Railway Labor Act, as amended (45 U. S. C. §153 First; 48 Stat. 1189) which provides for the establishment and jurisdiction of the National Railroad Adjustment Board; and Sections 1 and 2 of the Act, as amended (45 U. S. C. §§151, 151a, 152; 48 Stat. 1185, 1186, 54 Stat. 785, 786, 64 Stat. 1238), the former being a definition of terms and the latter a statement of the general purposes and duties to settle disputes. Pertinent provisions of Sections 1, 2 and 3 of the Act are set forth in the Appendix, pp. 35-43, *infra*.

QUESTION PRESENTED.

Does a District Court of the United States have jurisdiction over the subject matter of a claim, first made by respondent's decedent while he was still an employee of the petitioner, for extra pay for services performed as a railroad employee, in a dispute arising under an existing collectively bargained railway labor agreement, solely because the suit on the claim is brought by the employee after he had left active service; or is exclusive jurisdiction over such claim and dispute in the National Railroad Adjustment Board established under the Railway Labor Act?

2

STATEMENT OF THE CASE.

Respondent's decedent, Charles A. DePriest, had been employed by the petitioner as a railroad fireman, then locomotive engineer, from May 13, 1918 until March 10, 1955, at which time he resigned and applied for his annuity (Complaint, para. 5; R. 2).

One month later, on April 11, 1955, Charles A. DePriest, then a New Jersey resident, filed a complaint in the United States District Court for New Jersey against the petitioner, a Pennsylvania corporation, seeking to recover from petitioner extra pay to which he claimed to be entitled from the petitioner railroad employer for services performed as a railroad employee under a collective bargaining agreement.

DePriest alleged that on March 1, 1941, the petitioner and the Baltimore and Eastern Railroad Company, as employers, and the Brotherhood of Locomotive Engineers, a labor union, had entered into an agreement for the benefit of locomotive engineers employed by the two railroads in both yard and road service, of which DePriest was one (Complaint, para. 6; R. 2). The agreement provided, inter alia, that:

"4-0-2. (a). Where regularly assigned to perform service within switching limits, yard engineers shall not be used in road service beyond such switching limits when road engineers are available, except in case of emergency. When yard engineers are used in road service beyond their switching limits under the conditions just referred to, they shall be paid miles or hours, whichever is greater, with a minimum of one hour, for the class of road service performed beyond

their switching limits, in addition to their regular day's pay and without any deduction therefrom for the time consumed in said service" (Complaint, para. 6; R. 2).

DePriest claimed that between February 1, 1948, and the time of his retirement he had performed road service outside his switching limits on between 1,000 and 1,500 occasions on the trackage of the Baltimore and Ohio Railroad on the Delaware River Waterfront which entitled him to compensation in the sum of \$27,000 under his interpretation of the railway labor agreement aforesaid (Complaint, para. 10; R. 4). Under petitioner's interpretation of the contract DePriest did not go beyond his switching limits on such occasions and did not perform road service. (Answer, para. 7, 9 and Fourth Defense; R. 5, 6).

DePriest also alleged that prior to his retirement his claims were denied by the Road Foreman of Engineers, his then immediate superior, by the Division of Superintendent (sic) under whom he worked and by the General Manager of the Eastern Region of the Pennsylvania Railroad Company who is the Chief Operating Officer of the defendant in the region where DePriest was employed (Complaint, para. 10; R. 4). DePriest then alleged that upon the occurrence of his retirement the National Railroad Adjustment Board had no jurisdiction of the matter and he accordingly was asserting his claims in this action in the District Court (Complaint, para. 10; R. 4).

Petitioner moved to dismiss the action for lack of jurisdiction over the subject matter upon the grounds that (1) this action involves the construction of a contract between a railroad employer and a labor union, and under the provisions of the Railway Labor Act, the National Railroad Adjustment Board has exclusive jurisdiction of said action and (2) the application of DePriest for an annuity under the Railroad Retirement Act and his voluntary relinquish-

ment of the right to return to service did not deprive the Board of its exclusive jurisdiction over the subject matter of this claim for wages for services allegedly performed as a railroad employee (R. 26).

In support of its motion petitioner filed an affidavit stating that claims for alleged additional wages due similar to those being advanced by DePriest were filed against petitioner by two engineers, which after their death, were progressed by their administrators to the First Division of the National Railroad Adjustment Board where they were docketed and awaiting decision (R. 28). Petitioner also filed in support of the motion a certified copy of an award of the National Railroad Adjustment Board, First Division, wherein the Board took jurisdiction over a pay claim by a retired employee (R. 29).

The motion to dismiss was denied with leave to the petitioner to request a reasonable stay of the trial pending determination of like issues between the other claimants and the petitioner then before the National Railroad Adjustment Board (R. 31). The petitioner then filed its answer generally denying DePriest's claims and asserting eight defenses thereto, including the defenses that the Court was without jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted (R. 5-8).

Petitioner then moved for summary judgment on the ground that administrative remedies had not been exhausted or in the alternative sought an order staying proceedings pending a decision by the National Railroad Adjustment Board interpreting the basic agreement involved in this action (R. 20).

The District Court, after hearing the motions held that the action involved the construction of a contract between a railroad employer and a labor union which, under the provisions of the Railway Labor Act, was exclusively for

determination by the National Railroad Adjustment Board, a requirement not affected by DePriest's voluntary retirement, and that "the interpretation of the contract here will affect working conditions of present employees and may lead to labor strife, the very type of friction the National Railway Labor Act was designed to prevent." 145 F. Supp. 596, 599. On September 28, 1956, an order was entered by the District Court staying all proceedings until the Board decided the cases before it involving the same provisions of the contract in suit (R. 20). DePriest appealed from this order to the United States Court of Appeals for the Third Circuit. DePriest died on February 11, 1957, and his administrator was substituted as plaintiff-appellant in the action. The Court of Appeals dismissed the appeal for want of appellate jurisdiction. 243 F. 2d 485. After argument in the Court of Appeals in this matter, but before the decision to dismiss the appeal for want of appellate jurisdiction, the National Railroad Adjustment Board, First Division, made three awards denying claims in matters involving the interpretation of the contract here involved with respect to the same issue.

Petitioner then again moved the District Court to dismiss the complaint on the ground that the Court lacked jurisdiction of the subject matter (R. 8). In support of the motion petitioner attached certified copies of the three awards of the Board to which reference is above made (R. 9-18).

The District Court determined that the issue involved was one of interpretation of a collective bargaining railway labor agreement and that the question of interpretation was exclusively for the National Railroad Adjustment Board, 155 F. Supp. 695 (R. 21). The District Court then entered an order dismissing the complaint for want of jurisdiction over the subject matter (R. 25).

The Court of Appeals for the Third Circuit in the decision

appealed from here vacated this order of the District Court and remanded the case for further proceedings (R. 40). It held that the requirements of an ordinary diversity action were met and that the Railway Labor Act did not deprive the District Court of jurisdiction over a claim by a retired employee for additional compensation allegedly owing under collectively bargained railway labor agreement, for services performed as a railroad employee. It relied upon the authority of *Moore v. Illinois Central R. Co.*, 312 U. S. 630 (1941), which involved a common law action for wrongful discharge. The Court of Appeals said: "We see no reason to distinguish between this situation and one to recover for wrongful discharge." Thus, the District Court was held to have jurisdiction of this claim for extra pay, which is based on the interpretation of a railway labor agreement.

SUMMARY OF ARGUMENT.

The decision of the Court of Appeals below should be reversed by this Court because:

1. The 1934 Amendments to the Railway Labor Act provided in Section 3 for the establishment of the National Railroad Adjustment Board and made use of its orderly procedures mandatory for the adjustment of disputes growing out of the interpretation of collectively bargained railroad labor agreements covering rules, rates of pay and working conditions. This Court has consistently held that these means provided by the Act for determining disputes concerning this subject matter are compulsory and that the exclusive remedies provided by the Act oust the courts of jurisdiction.

2. The only exception heretofore recognized to the exclusive jurisdiction of the National Railroad Adjustment Board to interpret railroad labor agreements is where a railroad employ  e has been dismissed from service, has accepted his discharge as final, and has brought a common law or statutory action in court for damages for wrongful discharge.

3. The subject matter of a dispute over extra pay for railroad work which involves the interpretation of a railway labor agreement is exactly the same whether the claimant is an active employee or inactive and retired. Voluntary retirement by the employee from active service does not change the nature of his claim for extra pay under an agreement, nor the implications in the railroad industry of its determination. The Adjustment Board exercises its jurisdiction over claims by retired employees such as respondent, as well as over claims by deceased employees. It can give a complete remedy in extra compensation cases, such as this, by awarding back pay. Thus, the Railway Labor Act provides an administrative procedure for determining pay claims under railroad collective bargaining agreements. The fact that the dispute is pressed by respondent, rather than a presently active employee, does not create jurisdiction in the courts to decide this administrative question. Court jurisdiction over this dispute, furthermore, will render uncertain the application to other claimants of the contract provision in issue, and cause unrest and dissatisfaction contrary to the purposes of the Act.

4. Unless the courts, both federal and state, are to be thrown wide open for the interpretation of collectively bargained agreements in the railroad industry, the inactive status of a railroad employee cannot vest the courts with jurisdiction over pay claims within the power of the Ad-

justment Board to determine. There are a host of such prospective claimants among employees who retire, resign or are dismissed. In addition, this class of claimants might be extended to include inactive employees on furlough, out of service because of illness or disability, absent in military service, or out of active service for any other reason. It is submitted that if the status of the claimants vested jurisdiction in the courts, uniformity of interpretation of the collective bargaining agreement would be a forlorn hope, confusion would rule in the railroad industry, and the results Congress sought to attain by establishing the Adjustment Board would be thwarted.

ARGUMENT.

I. Under the Railway Labor Act the National Railroad Adjustment Board has exclusive jurisdiction to hear and determine disputes growing out of the interpretation of agreements covering rates of pay for work on the railroads.

In 1934 the prior unsuccessful voluntary procedures provided by Section 3 of the Railway Labor Act of 1926 (44 Stat. 577) to settle disputes growing out of the interpretation of railroad labor agreements were replaced by Congress with an orderly and compulsory procedure.

By the 1934 amendments to the Railway Labor Act, Congress made use of the boards established under the Act mandatory, to the exclusion of resort to the courts in the first instance, if either party to a dispute growing out of the interpretation of a railroad labor agreement covering rates of pay desired to progress the dispute beyond the property of the carrier.

Congress made its intention in this regard clear at the beginning of Section 2 of the 1934 Act (45 U. S. C. §151a, Appendix infra, p. 37) by declaring that it was a general purpose of the Act to avoid any interruption to commerce and to provide for the prompt and orderly settlement of all disputes growing out of the interpretation of agreements covering rates of pay for work on the railroads.

To accomplish this purpose the 1934 Act amended Section 3 to establish the National Railroad Adjustment Board (45 U. S. C. §153, First, Appendix infra, p. 37). The major part of the section is devoted to the mechanics of this Board. Then §3 First (i) reads:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." (Emphasis supplied.)

Thus the statute provides that disputes growing out of the interpretation of agreements concerning rates of pay, rules, or working conditions should first be handled by the usual course of discussion on the property of the railroad. This procedure was followed by respondent (Complaint, para. 10; R. 4). If such handling is not productive of a

satisfactory result, then either party may progress the matter further if it desires. If there is a system or other agreed board it must go to it. But if there is not, and there is not in most situations, it must go to the Adjustment Board. This accords with the stated purpose of the statute to avoid interruption of rail service and to provide for the prompt and orderly settlement of pay disputes involving the interpretation of collectively bargained railway labor agreements and accords with the statutory duty to exert every reasonable effort to settle disputes.

This Court has consistently held that the National Railroad Adjustment Board is intended by Congress to have exclusive jurisdiction over the interpretation and application of collectively bargained agreements in the railroad industry and that Congress did not intend to permit any interruption by a Federal or State court in the process of adjustment of these minor disputes prior to the time that an award has been made by the Adjustment Board.

This principle was firmly established in *Slocum v. D. L. & W. R. Co.*, 339 U. S. 239 (1950). In that case the Court of Appeals of New York had affirmed a judgment in favor of a railroad carrier in an action it instituted for a declaratory judgment as to rights under collectively bargained labor agreements. This Court reversed, holding that the jurisdiction of the Adjustment Board to adjust disputes of the type involved was exclusive and that it was error for the New York courts to uphold a declaratory judgment interpreting the collective bargaining agreements.

In the *Slocum* case, this Court referred to the history of the handling of disputes over the interpretation of existing bargaining agreements and the passage of the 1934 amendments to the Railway Labor Act (pp. 242-3) and stated (p. 243):

“* * * The Act thus represents a considered effort on the part of Congress to provide effective and desirable

administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems."

The Court then referred to its decision in *Order of Railway Conductors v. Pitney*, 326 U. S. 561 (1946), that a court should not have interpreted a railway labor contract, "but should have left this question for determination by the Adjustment Board, a congressionally designated agency peculiarly competent in this field" (p. 244) and concluded:

"This reasoning equally supports a denial of power in any court—state as well as federal—to invade the jurisdiction conferred on the Adjustment Board by the Railway Labor Act" (p. 244).

On the same day the *Slocum* case was decided this Court, further emphasizing the intent of Congress with respect to the exclusive jurisdiction of the Board, decided *Order of Railway Conductors of America v. Southern Railway Co.*, 339 U. S. 255 (1950). In that case, the railroad commenced an action in a state court against the Order of Railway Conductors seeking a declaratory judgment that the agreement did not require extra pay for certain services as claimed by the conductors. The state court proceeded to adjudicate the dispute. This Court reversed the decision of the state court on the ground that the state court was

without power to interpret the agreement and that exclusive jurisdiction was vested by Congress in the Railroad Adjustment Board.

The analogy between the type of dispute involved in the *Southern Railway* case and the dispute involved in the present case is striking. Both involve claims by employees involved in the operation of trains for extra pay for a certain type of service, and this is exactly the type of dispute which Congress intended the National Railroad Adjustment Board to handle exclusively.

This Court in the *Southern Railway* case emphasized the conflicts that could arise from court intervention in minor disputes and then turning to the statutory language said (pp. 256-257):

And if a carrier or a union could choose a court instead of the Board, the other party would be deprived of the privilege conferred by §3 First (i) of the Railway Labor Act, 45 U. S. C. A. §153 First (i), F. C. A. title 45, §153 First (i), which provides that after negotiations have failed 'either party' may refer the dispute to the appropriate division of the Adjustment Board."

The subsequent cases have sustained and strengthened this view that disputes arising out of the interpretation of railway labor agreements may only be submitted to the Railroad Adjustment Board whose jurisdiction is exclusive and may not be taken to court. In *Railroad Trainmen v. Chicago River R. R.*, 353 U. S. 30, 39 (1957), this Court reviewed the legislative history of the Railway Labor Act and held that it was generally understood that the provisions dealing with the Adjustment Board, 45 U. S. C. §153, First, "were to be considered as compulsory arbitration in this limited field." Shortly thereafter in *State of California v. Taylor*, 353 U. S. 553, 558, 559 (1957), this Court held

that the Adjustment Board "was given jurisdiction over 'minor disputes', meaning those involving the interpretation of collective bargaining agreements in a particular set of facts" and characterized Section 153 First, as "compulsory arbitration".

These clear cut decisions were foreshadowed by the extensive discussion of the Railway Labor Act in *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711 (1945). In that case the narrow issue upon which the decision rested was whether the union, as agent of employees, had authority by virtue of the Act or otherwise, either to compromise and settle claims of certain employees or submit them for determination by the Adjustment Board. However, the Court gave every indication that the Railway Labor Act provided mandatory machinery for the adjustment of minor disputes when not settled within the railroad organization.

In *Transcontinental Air v. Koppal*, 345 U. S. 653, 660 (1953), this Court emphasized that the Railway Labor Act "provides a procedure (the Adjustment Board) for handling grievances so as to avoid litigation and interruptions of service * * *." In truth, the Adjustment Board was established for those very purposes.

The Railway Labor Act and the cases above cited which have interpreted the act, show beyond any doubt that the National Railroad Adjustment Board has exclusive jurisdiction of disputes involving the interpretation of railway labor agreements, specifically including disputes involving claims for additional pay under such agreements. The subject matter of the respondent's claim here is additional compensation based on his interpretation of a collectively bargained railway labor agreement—the same subject matter that the *Southern Railway*, *Chicago River*, and *Taylor* cases held was within the exclusive jurisdiction of the Adjustment Board.

Similar results have been reached by the Courts of Ap-

peal for the Fifth, Seventh and Tenth Circuits, which have held that where the dispute concerns a wage provision of a collective bargaining agreement made pursuant to the Railway Labor Act and can be resolved by an interpretation of the agreement, exclusive jurisdiction lies in the National Railroad Adjustment Board or system board where one exists. *Sigfred v. Pan American Airways*, 230 F. 2d 13 (C. A. 5, 1956), cert. den. 351 U. S. 925; *Buster v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 195 F. 2d 73 (C. A. 7, 1952); *Walters v. Chicago & North Western Ry.*, 216 F. 2d 332 (C. A. 7, 1954); *Switchmen's Union v. Ogden Union Ry.*, 209 F. 2d 419 (C. A. 10, 1954), cert. den. 347 U. S. 989.

II. The only exception to the exclusive jurisdiction of the National Railroad Adjustment Board in such disputes is the common law or statutory suit by an employee for damages for wrongful discharge.

Against the tide of this established doctrine, the Court of Appeals below in support of its holding relied heavily upon the case of *Moore v. Illinois Central R. Co.*, 312 U. S. 630 (1941). That case arose out of the alleged illegal discharge of Moore and this Court held that Moore could bring a common law action for wrongful discharge in court and was not required to resort to the Adjustment Board.¹

The holding in the *Moore* case represents the only deviation from the principle of the exclusive jurisdiction of the National Railroad Adjustment Board in disputes involving

¹ Moore was discharged on February 15, 1933, before passage of the 1934 Amendments to the Railway Labor Act, *Moore v. Illinois Central R. Co.*, 180 Miss. 276 (1937). Denial to Moore of the right to bring a common law action for wrongful discharge, on the basis of the 1934 Amendments, might well have involved serious constitutional problems.

interpretation of railway labor agreements. The *Moore* case was decided nine years before *Slocum* and was carefully distinguished by this Court in the latter decision, in the following language (339 U. S. at pp. 244-5):

"Our holding here is not inconsistent with our holding in *Moore v. Illinois Central R. Co.*, 312 U. S. 630. Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective-bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board.

"We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive.⁷ The holding of the *Moore* case does not conflict with this decision, and no contrary inference should be drawn from any language in the *Moore* opinion."

⁷ We are not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative, as in *Steele v. Louisville & N. R. Co.*, 323 U. S. 192. Nor are we called upon to decide any question concerning judicial proceedings to review board action or inaction."

This Court thus limited and distinguished the *Moore* case on the ground that Moore's suit for damages for wrongful discharge differed from any remedy which the National Railroad Adjustment Board had power to provide, since the Board could grant only reinstatement in service and back pay. Additionally, the Court pointed out that when Moore accepted his discharge as final he ceased to be an employee, that Moore's court action did not involve questions of future relations between the railroad and its other employees and that consideration by the court of provisions of the collective bargaining agreement, to the extent necessary in the action for wrongful discharge, would have no binding effect on future interpretations by the Board.

It is significant that the Court went on to deny expressly the existence of any conflict between the general principles expressed in *Slocum* and the special situation found in the *Moore* case.

Consistently since the *Slocum* decision the courts have accepted jurisdiction in wrongful discharge suits only and have left wage claims and other disputes over the interpretation and application of railroad labor agreements to the Adjustment Board. See among others *Brooks v. Chicago R. I. & P. R. R. Co.*, 177 F. 2d 385 (C. A. 8, 1949); *Butler v. Thompson, et al.*, 192 F. 2d 831 (C. A. 8, 1951); *Broadly v. Illinois Central R. R. Co.*, 191 F. 2d 73 (C. A. 7, 1951); *Broome, et al. v. Louisville & Nashville R. R. Co.*, 194 Tenn. 249, 250 S. W. 2d 93 (Supreme Court of Tennessee, 1952); *Switchmen's Union, et al. v. Ogden Union Ry. & Depot Co.*, 209 F. 2d 419 (C. A. 10, 1954), cert. den. 347 U. S. 989; *Walters v. Chicago & North Western Railway*, 216 F. 2d 332 (C. A. 7, 1954).

The Court of Appeals below extended what it conceived to be the holding of the *Moore* case to cover respondent's suit—a claim for additional compensation, based on respondent's interpretation of the applicable collectively bargained agreement, which arose while respondent was an

active railroad employee; was handled by him or his representatives under the applicable grievance procedure on the railroad, and is clearly within the exclusive jurisdiction of the Adjustment Board under this Court's decision in the *Slocum* case, unless the principles established in *Slocum* are nullified by respondent's retirement.

Although the court below recognized that "the courts have consistently drawn a distinction between those cases in which the employee, having been discharged, accepts his discharge, and those in which he seeks a judicial interpretation of a collective bargaining agreement and enforcement of his employment rights in such a manner as to affect future relations between the railroad and other employees" (R. 35), it placed respondent's claim for additional wages in the same category as a suit for wrongful discharge and held it to be within the jurisdiction of the federal courts. The gist of the decision below is found in the following language (R. 37):

"Here, as in the *Moore* case, the employer-employee relationship has been terminated; the substantive issue is whether something is owing to the plaintiff. While the court may have to consider a provision of a bargaining agreement, its interpretation would have no binding effect upon future interpretations by the Board, and the future relations between the carrier and its other employees are not involved. Since the claimant in the *Moore*, or in the instant, situation, is not an employee, there does not exist the unhappy discontent among co-employees because of dissimilar treatment for similar work."

Thus the Court of Appeals held that because respondent was no longer an employee when suit was brought, because the court's interpretation of agreement provisions would have no binding effect on future interpretations by the Ad-

justment Board, and because it believed future relations between the railroad and its other employees were not involved, respondent could maintain his action for wages in court.

It is evident that the holding below ignored the principle bases upon which the Court distinguished the special situation of the *Moore* case when this Court adopted the general principle of the *Slocum* decision. The court below failed even to mention that this Court in *Slocum* distinguished the *Moore* case on the basis that Moore's action for wrongful discharge constituted a remedy which the Adjustment Board could not provide. In the present case respondent, by an award of the Adjustment Board, could unquestionably secure the additional wages claimed. The chief circumstances which led to this Court's decision in the *Moore* case, therefore, finds no parallel in the present case. Respondent has a full and adequate remedy in the Adjustment Board, unless the decision below can be construed to mean, as alleged in the complaint (para. 10; R. 4) that following respondent's retirement the Board had no jurisdiction to handle his claim.

Apart from *Moore*, the court below relied only on the decision of the Court of Appeals for the First Circuit² in

² The current thinking of the Court of Appeals for the First Circuit toward the jurisdiction of the Adjustment Board was expressed in *Duplisea v. Maine Central Railroad*, 260 F. 2d 495 (C. A. 1, 1958), where it said:

"Thus Congress not only failed expressly to create a special jurisdiction in the federal courts for adjudication of claims based on violations of such (railroad) collective bargaining contracts, but Congress in fact did create such a jurisdiction in an administrative body. As stated in *Starke v. New York, Chicago & St. Louis R.R. Co.*, 180 F. 2d 569, 573-574 (C. A. 7th, 1950):

'Congress having specifically conferred upon the Adjustment Board the authority to hear and determine plaintiff's grievance, it is not in the absence of express language to be implied that it also intended to confer jurisdiction upon the courts. Such a holding * * * would seriously impair if not destroy the usefulness of the Act and the purpose which Congress sought to achieve.'"

Cepero v. Pan American Airways, 195 F. 2d 453 (1952), cert. den. 344 U. S. 840, re-hearing den. 344 U. S. 882. The basic issue in the *Cepero* case was the validity of a collective bargaining agreement. No question of interpretation thereof was involved. On finding the agreement valid the First Circuit affirmed the judgment of the District Court, dismissing the complaint, and made only a reservation that the Lower Court could inquire into a wrongful discharge issue if present. The instant matter involves neither the validity of a collective bargaining agreement nor an issue of wrongful discharge so the *Cepero* case is clearly distinguishable. Since no question of interpretation of a collective bargaining contract was involved in the *Cepero* case it was not necessary for the Court in that case to speculate whether or not a wage claim by an employee out of service stood on a different footing from an alleged wrongful discharge action.

It is submitted that in aligning the present case with *Moore*, and thence concluding that the federal court had jurisdiction, the court below was in error. There are serious and compelling reasons, discussed below, for upholding the exclusive jurisdiction of the National Railroad Adjustment Board over claims of railroad employees under collective bargaining agreements, where such claims arise or are based on occurrences taking place during their employment, regardless of the status of the employees at the time the claims are ripe for Board handling.

III. Where the claimant is an employee at the time his claim for extra pay accrues under a railroad collective bargaining agreement, the intent of the Railway Labor Act is that the dispute falls within the exclusive jurisdiction of the Adjustment Board regardless of claimant's subsequent status.

It is undisputed that this controversy arose out of the provisions of a railroad collective bargaining agreement, that at the time the controversy arose the claimant Charles DePriest was an employee of the petitioner railroad and that he continued to be an employee of the railroad during all periods in which he performed services on which his claims are based.

As has been discussed, it is well established by this Court that the National Railroad Adjustment Board has exclusive jurisdiction to adjudicate such disputes between carriers and their employees. The Court of Appeals below, however, in directing that these claims be returned to the trial court for further proceedings, was of the opinion (R. 37) that because the active employer-employee relationship between DePriest and the railroad had been terminated, the district court had jurisdiction. Thus, the court below in substance, held that the claimant, Charles DePriest, by voluntarily retiring subsequent to the accrual of his alleged cause of action thereby vested the federal court with jurisdiction.

It is submitted that the court below, in so holding, proceeded on the erroneous assumption that the primary distinction between the *Moore* case and the *Slocum* case is merely whether an active employment relationship does or does not still exist between the employee or employees involved and the carrier. The court also pointed out that, as in *Moore*, the court's interpretation of the agreement would

not be binding on the Adjustment Board, and would not affect future relations between petitioner and its employees. These latter findings, however, if true, simply follow from the basic holding that termination of the active employee relationship gives the courts jurisdiction.

It is submitted, however, that the real and most important distinction between *Moore* and *Slocum* is that *Moore's* court action for wrongful discharge afforded him a remedy which the Adjustment Board could not provide. In both decisions this Court held that by creating the National Railroad Adjustment Board Congress did not intend to take away from the railroad employee the remedy, available at common law or by statute, of recovering damages from his railroad employer for wrongful discharge. The Board could afford a discharged employee only reinstatement and back pay, and it was held that Congress did not intend to require the employee to seek reinstatement.

Furthermore, the *Slocum* and *Moore* cases taken together clearly limit jurisdiction of courts to actions for wrongful discharge. Any sort of claim by an employee who has voluntarily retired is clearly not a wrongful discharge action, and can clearly be distinguished from such an action. The issue in a suit for wrongful discharge such as that permitted in *Moore* is whether the employer acted wrongfully in terminating the employee's employment against the will of the latter. It is an action for breach of contract under certain limited circumstances. This limited type of breach of contract action is the only one over which courts have jurisdiction in connection with railroad contracts. Obviously no such issue is raised in the present case where DePriest's termination of employment was brought about by his voluntary action.

In the present case nothing is taken from respondent in requiring progression of the dispute to the Adjustment Board. A claim arising under a collective bargaining agree-

ment for additional compensation, such as that of Charles DePriest, is simply a claim for a fixed amount which can readily be awarded to the employee by the Board. The Board does have power to interpret the agreement involved in this action, to decide whether or not the respondent's claims for extra pay for alleged service performed as a railroad employee are justified by the agreement, and to order the petitioner to make such payment. No different basis of recovery is available through court action. Consequently the most impelling consideration for court jurisdiction is not present here as it was in *Moore*.

Furthermore, it is submitted that the holding of the court below, that a court's interpretation of a collective agreement in a claim for additional compensation by a retired employee would not affect future relations between petitioner and its employees, is erroneous. This conclusion is based solely on the presumed physical absence of an employee after his separation from active service. However, the situation is entirely different from that in *Moore*. A discharged employee does not leave behind him in active service other employees with the same claims based on alleged wrongful discharge, but an employee who carries with him wage claims when he retires or otherwise terminates employment does leave behind other and active employees who have or may in the future have identical wage claims against the railroad.³ This occurred in the case of DePriest's retirement (R. 9-18, 28).

³ In *Marchitto v. Central Railroad Company of New Jersey*, 18 N. J. Super. 163, 88 A. 2d 795 (App. Div. 1952), cert. den. 9 N. J. 403, 88 A. 2d 537 (Supreme Ct. of N. J. 1952), there was an action by a railroad employee for additional earnings claimed under a collectively bargained agreement. It was held that the court had no jurisdiction and that exclusive jurisdiction was lodged in the National Railroad Adjustment Board. In that case, the Appellate Division said:

"Additionally, plaintiff contends that 'the case *sub judice* is one for money damages only; that in no wise does it affect the future labor relationship of himself or any other employees'. We think that it is reasonably within the realm of probability that there

Assume that a train crew, consisting of conductor and three brakemen, working under the same agreement, performs some service for which the crew members claim extra pay. The claims are denied by the railroad. The conductor retires, and in accordance with the decision below brings suit for the additional compensation. The claims of the other three men, based on the same agreement and service, must go to the Adjustment Board under the *Slocum* decision. The Board denies the brakemen's three claims; the court holds in favor of the conductor and awards him the extra pay.

Here the relationship of the railroad and its employees is indeed affected, and adversely, by the obvious dissatisfaction of the employees who have lost their claims, a dissatisfaction which may well extend not only to the railroad but also to the representatives of the employees affected and to the Board itself. This example indicates that the effect of the decision below may well be to aggravate the industry's problems with regard to claims and grievances of the type which was characterized by this Court in the *Slocum* case as "a potent cause of friction leading to strikes" (339 U. S. at p. 242).

Petitioner has generally assumed in this brief that the meaning of the decision below is that the courts and the Adjustment Board have concurrent jurisdiction over claims by retired employees arising out of service performed by them prior to retirement. Although the approach of the court below was basically that DePriest was no longer an

are other individual employees who may be now, or in the future, similarly situated and who will be affected by the determination of this action. Can it, therefore, be successfully asserted that a determination of this issue will not disturb the future relationship of the railroad and its employees and result in a rupture of the employer-employee relationship, thereby causing a severance of interstate commerce? We think not."

"employee", and the court quoted the statutory definition of "employee" in 45 U. S. C. Section 151 Fifth, as well as the statement of the Board's jurisdiction over disputes between carriers and their employees in 45 U. S. C. Section 153 First (i) (R. 34), there is no flat holding that the Board had no jurisdiction over DePriest's claim after his retirement. Such a holding, denying the benefits of Board procedure to retired and other out of service employees because their claims were not disposed of before employment terminated, would appear contrary to the intent of Congress, but it is submitted that it is equally inconsistent to reach a result that gives the Adjustment Board exclusive jurisdiction over such claims when presented by active employees (under the *Slocum* decision) and concurrent jurisdiction to the courts and the Board, when handled by retired employees and others who have just left active service.

As pointed out above, the most compelling reason for exclusive and compulsory Board jurisdiction is to prevent labor unrest and strife in the railroad industry. Concurrent jurisdiction by the courts and the Board over identical wage claims carries the implicit threat of dissatisfaction and trouble between railroads and their employees, and is directly opposed to the interpretations of the Railway Labor Act heretofore adopted by this Court.

It should be pointed out that a claim or grievance may be referred by "either party" to the Adjustment Board, 45 U. S. C. Section 153, First (i). Thus, under the statutory language it is not necessary that such a dispute be referred to the Adjustment Board by a person who is, at the time of referral, an "employee". It may be referred by "either party" to the dispute—which may be the railroad or, as in this instance, the respondent.

The Adjustment Board will not refuse to docket and handle a claim merely because the claimant has applied for an annuity under the Railroad Retirement Act and vol-

untarily relinquished his right to return to service. The retirement of an employee from active service has never been held to deprive the Board of its jurisdiction over an employee's claims, the subject matter of which is within the Board's jurisdiction. The Railroad Adjustment Board has accepted and decided numerous claims by retired employees. In support of the motion to dismiss before the District Court there were filed certified examples of awards in such cases by the Board (Awards Nos. 11888, 12418, 15406, 16129 and 1420). As an example Award 15406 is printed at R. 29. Moreover, the Adjustment Board has taken jurisdiction of claims for wages even though the employees in question were deceased. Affidavit of H. D. Krugel, R. 28; see also Award No. 2422 of the National Railroad Adjustment Board, Third Division.

It is submitted that in the decision below the plain meaning and purpose of Section 153, First (i) was lost sight of, particularly the clear intent of that section that the nature of the dispute is paramount, not the status of the claimant after the facts giving rise to the dispute have materialized. If the Board and the courts have concurrent jurisdiction, the "races of diligence" decried in the *Southern Railway Co.* case would be fostered, a situation which the exclusive jurisdiction of the Adjustment Board effectively prevents.

It is again emphasized that the cause of action alleged in the instant case is based upon facts which occurred at a time when the claimant was in the active service of the petitioner and prior to the time of his voluntary retirement. The claim grew out of his employment relation with the petitioner. His claims were made to the petitioner as an employee. The dispute from its inception was between the petitioner and the claimant as an employee. This is not a cause of action which has arisen since the termination of the claimant's active employee status with the railroad by retirement or out of any action taken by him with respect to his retirement.

It thus clearly appears in the case here involved that there is a dispute between one who is seeking to enforce alleged rights as a railroad employee and a carrier involving the "interpretation" of an agreement "concerning rates of pay". As has been discussed, the Act provides that any party interested in the dispute may refer the dispute to the Board. The fact that the respondent bases his suit upon a railway labor agreement shows his interest in the interpretation of the agreement with regard to extra pay and that he could have applied to the Adjustment Board. It is submitted that if a dispute arises between a carrier and a person who is an employee at the time of the occurrence which gives rise to it and the claim is based upon happenings which occurred while the claimant is an employee, the dispute is one between a "carrier" and an "employee" within the meaning of the Railway Labor Act, even though the employment relation may be terminated at a later date.

Congress intended that disputes involving the wage claims of employees should be progressed in the usual manner through the operating officers of the carrier and then, failing settlement, must go to the Adjustment Board if further proceedings are desired by either party. Obviously, a claim for wages by an employee who, subsequent to the completion of the incident out of which the claim arose, voluntarily relinquished his right to service, falls within this congressional intent and must be brought before the Adjustment Board and cannot be taken in the first instance to any court in the land happening to have jurisdiction over the person of the defendant. The opinion below leads to the ultimate and erroneous conclusion that any railroad employee, by retiring, resigning or otherwise leaving active service could by-pass the Adjustment Board and thus defeat the purpose of Congress and avoid the plan established by that body.

IV. The courts will be opened to extensive railroad labor litigation if the inactive status of a railroad employee vests the courts with jurisdiction over pay claims within the power of the Adjustment Board to determine.

The decision of the court below allows an action in the federal courts which is inconsistent with the orderly procedure provided by Section 3, First, of the Railway Labor Act for the National Railroad Adjustment Board to determine disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" * * * From the legislative history of Section 3, First, which was extensively reviewed by this Court in the *Chicago River* and *Taylor* cases, *supra*, it is certain that the Adjustment Board was created to compel disputes over the interpretation of agreements, such as presented by the respondent here, if processed beyond the carrier, to be taken exclusively to the Adjustment Board where special knowledge and skills, not within the conventional experience of judges, can be applied.

Examination of the provisions of the agreement involved in this case will show that they contain terminology peculiar to the railroad industry, such as "switching limits", "yard", "road service", "yard-belt", "transfer service", "belt line service"; etc. (R. 2, 3). The proper application of such provisions to particular situations requires knowledge with respect to various phases of railroad operation, operating practices, etc. The interpretation of this type of provision is a function of the exact nature which this Court had in mind when it said in the *Slocum* case that the members of the Adjustment Board understand railroad problems and speak the railroad jargon (339 U. S. at page 243).

To permit the jurisdiction of a federal district court to be

invoked to decide a dispute as to the meaning of a wage provision of a railroad collective bargaining agreement is to invade the exclusive jurisdiction over disputes of that type which Congress gave to the Adjustment Board. The position adopted by the court below rejects the basic assumption of the Railway Labor Act that disputes over the meaning of railroad collective bargaining agreements should be settled exclusively within the confines of the structures erected by the Act. It opens the door to conflicting interpretations of such agreements by the Adjustment Board on one hand a variety of courts on the other, thereby dooming the uniformity, intended by Congress, which is attainable only within the statutory procedures.

The decision below further upsets the orderly procedure of the Railway Labor Act since it is not confined in its reach to pay-claims under agreements by retired employees.⁴ The language used by the court below might be held to justify invoking the jurisdiction of a court whenever the active employer-employee relationship no longer existed, even though the dispute concerned rates of pay, rules or working conditions under the collective bargaining agreement. Such situations might involve claims by inactive employees on furlough, out of service because of illness or disability, absent in military service, voluntarily resigning, or out of active service for any other reason. Either the out of service employee or the Railroad might go into court to get an interpretation of the agreement. A veritable Pandora's box would thereby be opened, throwing into

⁴ This class alone is large. In 1956-1957 retired railroad employees receiving benefits under the Railroad Retirement Act totaled 361,000, as reported in the Annual Report (p. 1) of the Railroad Retirement Board for the fiscal year ended June 30, 1957. H. R. Doc. No. 278, 85th Cong., 2d Sess. 1 (1958). In the year ending June 30, 1958 the Board granted retirement annuities to 42,100 retiring employees. 19 *The Monthly Review* No. 8, August, 1958 at p. 2. Many employees at retirement have claims or grievances pending against their employers.

federal district courts, or for that matter, state courts, a host of issues arising out of the disputed application and interpretation of collective bargaining agreements. Here again the basic and vital provision of the Act—the exclusiveness of the Act's procedures—would be grossly violated.

The holding of the court below leads to the conclusion that any railroad employee by retiring or resigning could by-pass the Adjustment Board and thus defeat and avoid the plan established by the Congress and lead to unrest among other employees having similar claims who are required to go before the Adjustment Board. Such an unrealistic approach does extreme violence to the announced plan of the Railway Labor Act to provide a procedure for interpreting labor contracts and settling disputes which would avoid serious conflicts between carriers and employees.

As pointed out above, while the lower court did not specifically decide whether the National Railroad Adjustment Board had concurrent jurisdiction with the courts or whether the courts alone had jurisdiction over claims by out-of-service employees, there is a strong possibility that the latter view governed the decision. Such a holding would, of course, deprive retired and other out-of-service employees of the Adjustment Board remedy provided by the Railway Labor Act, and in view of the new limits on the diversity jurisdiction of the Federal Courts as a practical matter would relegate most such claims to the state courts. The assumption of jurisdiction by the court below on any theory, if sustained, would make the administration of collective bargaining agreements in the whole railroad industry chaotic. This confusion is detrimental to the best interests of the carriers and their employees and is apt to aggravate the handling of minor disputes in the industry.

The final order of the District Court herein was "that the defendant's Motion to dismiss the action be granted because the Court lacks jurisdiction over the subject matter of the Complaint * * *" (R. 25). This is altogether consistent with the ground urged below by the petitioner for dismissal and the foregoing argument herein. All rest on the clear intent of Congress as unequivocally expressed in the Railway Labor Act, that the National Railroad Adjustment Board has exclusive jurisdiction over the subject matter of disputes, like that here, involving the interpretation of railway labor agreements concerning rates of pay.

It is submitted that by holding the procedure of Section 3, First (i) to be solely applicable to the determination of such disputes, rather than resort to the courts, the pattern of judicial construction of the Railway Labor Act in the light of Congressional intent will be preserved.

CONCLUSION.

Petitioner submits that in the above argument it has shown:

(1) The history of the Railway Labor Act and the decisions of this Court construing the Act establish that the National Railroad Adjustment Board has exclusive jurisdiction to hear and determine disputes growing out of the interpretation of railway labor agreements covering rates of pay, rules and working conditions.

(2) A claimant, who was an active employee of a railroad at the time of accrual of his claim growing out of the interpretation of a pay clause of a collective bargaining agreement, must submit the disputed claim to the National

Railroad Adjustment Board, or system board, if he desires to progress it beyond the property of the railroad. Under no circumstances can he by-pass the Adjustment Board and take such a dispute to court, regardless of whether he retired or otherwise became an inactive employee after his claim accrued. Congress did not intend to open the federal and state courts to these numerous disputes which have unique problems not ordinarily within a court's experience.

(3) Only by the exclusive application of the administrative machinery provided by Section 3, First (i) of the Railway Labor Act can the interpretation of provisions in a railroad labor agreement be handled in a manner which will avoid dissatisfaction among employees and avoid confusion and uncertainty in the railroad industry.

(4) Congress has provided in the Railway Labor Act an express administrative procedure for the determination of the extra pay dispute raised by respondent which is dependent upon the interpretation of a railroad collective bargaining agreement. Under the Act, the Adjustment Board can give a complete remedy—back pay. The holding of the court below that this dispute is to be determined judicially is in direct conflict with the past interpretation of the Railway Labor Act to the effect that Congress vested exclusive jurisdiction over this subject matter in the Adjustment Board. The presence of this administrative machinery divests the courts of jurisdiction to determine the dispute.

Petitioner therefore respectfully requests this Court to reverse the judgment of the Court of Appeals below and to affirm the judgment of the United States District Court

for the District of New Jersey dismissing respondent's complaint for lack of jurisdiction of the subject matter.

Respectfully submitted,

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APPENDIX.

RELEVANT STATUTORY PROVISIONS.

Sections 1, 2 and 3 of Title I of the Railway Labor Act, as amended (48 Stat. 1185, 1186, 1189, 54 Stat. 785, 786, 64 Stat. 1238; 45 U. S. C. §§151, 151a, 152, 153) provide in part as follows:

"Section 1. When used in this Act and for the purposes of this Act—

"First. The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such 'carrier': *Provided, however,* That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by

electric power falls within the terms of this proviso. The term 'carrier' shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

"Second. The term 'Adjustment Board' means the National Railroad Adjustment Board created by this Act.

* * *

"Fifth. The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

"The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple."

* * *

"Section 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * *

"Section 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board', the members of which shall be selected within thirty days after the approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

"(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

"(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

"(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any

original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

“(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

“(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section shall receive

from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however,* That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective, and, if the award includes

a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before a day named,

“(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

“(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.”

IN THE
Supreme Court of the United States
October Term, 1958

No. 397

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,
vs.

GEORGE M. DAY, Administrator ad Litem of the
Estate of Charles A. DePriest,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, GEORGE M. DAY,
ADMINISTRATOR AD LITEM OF THE ESTATE
OF CHARLES A. DePRIEST

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**BRIEF FOR RESPONDENT, GEORGE M. DAY,
ADMINISTRATOR AD LITEM OF THE ESTATE
OF CHARLES A. DePRIEST**

Questions Presented

1. Did the court below correctly determine that where the complete diversity of citizenship existed and where the amount or value of the thing in controversy exceeded \$3,000, exclusive of interest and costs, the United States District Court for the District of New Jersey had jurisdiction to determine a suit brought by an administrator of a pensioned or retired locomotive engineer against his former employer for wages?

2. Does a denial of jurisdiction to the United States District Court under the circumstances stated in Question

No. 1 constitute a deprivation to the administrator of the deceased pensioned or retired locomotive engineer, of a right of trial by jury secured to him under the Seventh Amendment to the Constitution of the United States?

3. Is the judgment of the United States Court of Appeals for the Third Circuit, now under review, reversible because, as the Judge of the United States District Court determined, the administrator of the deceased locomotive engineer is bound by awards adverse to his position, rendered by the National Railroad Adjustment Board in cases to which he was not a party but where the basic issues were similar?

Statement of the Case

Charles A. DePriest, the original plaintiff in this action and a resident of the State of New Jersey, filed his complaint in the United States District Court for the District of New Jersey against the petitioner, The Pennsylvania Railroad Company, a Pennsylvania corporation.

He alleged in his complaint that he had been employed since December 16, 1915 by the petitioner as a locomotive fireman and since May 13, 1918 as a locomotive engineer in which capacity he continued to be employed until March 10, 1955, at which time he resigned his employment and applied for his annuity (Complaint, para. 5; R. 2). His complaint further alleged that on March 1, 1941 a written and collectively bargained agreement was entered into between the petitioner and an affiliated carrier, as employers, with the Brotherhood of Locomotive Engineers for the benefit of engineers employed by the contracting carriers in both yard and road service, including himself, and that this agreement, among other things, provided that when, exclusive of any emergency, an engineer employed by the petitioner operated a train over the trackage of a foreign railroad, he performed a road service that entitled him to one day's

pay in addition to the day's compensation to which he was entitled for services on the road of his employer (Complaint, para. 6, 7; R. 2, 3). The complaint further asserts that between February 1, 1948, while he was assigned to road service and the time of his retirement, he was assigned to perform and did perform service for his employer on the trackage of the Baltimore and Ohio Railroad Company on between 1000 and 1500 occasions for each of which he is entitled to one full extra day's pay which has not been paid to him (Complaint, para. 9, 10; R. 4). His complaint demanded damages from the petitioner in the amount of \$27,000 and the *ad damnum* clause stated that he "elects that his retirement shall be a permanent dissolution of the employer-employee relationship existing between him and the Pennsylvania Railroad Company prior to March 10, 1955." His complaint alleged a complete diversity of citizenship (Complaint, para. 1, 2; R. 1), and that the sum or value of the matters and things in controversy, exclusive of interest and costs, exceeds the sum of \$3,000 (Complaint, para. 3; R. 1).

The petitioner then moved to dismiss the action for lack of jurisdiction over the subject matter on the grounds, .

1. That the action required the court to construe a collective bargaining agreement, a matter solely within the jurisdiction of the National Railroad Adjustment Board, and

2. That the retirement and pensioning of DePriest did not deprive the Board of its exclusive jurisdiction of the subject matter of the claim.

The United States District Court for the District of New Jersey denied the motion to dismiss but granted leave to the petitioner to apply for a stay of the action pending the determination of companion claims in the National Railroad Adjustment Board. Petitioner then answered the complaint and moved for a summary judgment on the ground

that the administrative remedies had not been exhausted, or, in the alternative, for an order staying the proceedings until the National Railroad Adjustment Board should have decided the companion claims.

The District Court then granted a stay of all proceedings and the plaintiff was unable to proceed with discovery or the perpetuation of testimony because of the stay. He then appealed this order to the United States Court of Appeals for the Third Circuit.

Before the appeal could be heard, DePriest died and the present plaintiff, who had been appointed Administrator ad Litem of DePriest's Estate by the Superior Court of New Jersey was substituted as a party plaintiff for DePriest by the Court of Appeals. George M. Day is also a resident and citizen of the State of New Jersey so that his appointment did not destroy the complete diversity of citizenship that had originally existed.

The Court of Appeals for the Third Circuit dismissed the appeal for want of jurisdiction. *Day, Admr. v. Pennsylvania R. R. Co.*, 243 F. 2d 485 (1957).

While the appeal was pending in the Court of Appeals, the National Railroad Adjustment Board which had deadlocked and called in a referee decided similar claims of other claimants adversely to the claimants and favorably to the petitioner. The petitioner again moved the District Court for a dismissal of this complaint on the ground that the court lacked jurisdiction over the subject matter of the suit. The learned District Court Judge filed an opinion (R. 19), 155 F. Supp. 695, in which he held that the National Railroad Adjustment Board had exclusive jurisdiction over such claims and that since the Board had adversely decided like claims, DePriest, and his Administrator, Day, were bound thereby although the DePriest claims had never been submitted to the Board. The respondent appealed to the Court of Appeals for the Third

Circuit from the order of dismissal entered in the District Court.

The respondent argued to the Court of Appeals that he was not bound by the decisions adverse to other claimants who had submitted their claims to the National Railroad Adjustment Board and that the awards of the National Railroad Adjustment Board were in no event to be considered to be final because the claimants adversely affected thereby had brought a further suit attacking the validity of the decisions of the National Railroad Adjustment Board, on the following grounds:

1. They did not voluntarily, or by election, submit to the jurisdiction of the Board. See *Naylor v. Pennsylvania R. R. Co.*, 106 F. Supp. 84.

2. A member of the Board which decided the cases was biased by a personal interest in the controversy adverse to the claimants' interest and the vote of said member affected the outcome of the proceedings.

3. The awards were procured by the fraud of the railroad company.

4. The said claimants were prevented from unmasking the defendant's fraud and from presenting material evidence by the absence of compulsory process or discovery proceedings and by the lack of the necessary confrontation of witnesses and the lack of a right or opportunity for the cross-examination thereof.

5. Defendant's proofs were not required to be supported by oath or affirmation.

6. The claimants were denied their statutory and constitutional right of a hearing.

7. The awards were not based upon any or substantial evidence, but upon fraud.

8. The said awards constituted a taking of claimants' property without due process of law and without just compensation.

Although the District Court had decided this case before it on some basis of estoppel or res adjudicata, the petitioner here argued to the United States Court of Appeals for the Third Circuit that the District Court had no jurisdiction over the subject matter of the claim asserted by the present plaintiff. That court in an opinion by Judge Kalodner (R. 32) *Day, Admr. v. Pennsylvania R. R. Co.*, 258 F. 2d 62, held that the requirements of an ordinary diversity action had been met (R. 34), that on the authority of *Moore v. Illinois Central R. R. Co.*, 312 U. S. 630, the Railway Labor Act did not deprive the District Court of jurisdiction of this cause and that the awards of the National Railroad Adjustment Board were not binding upon this respondent. The petitioner has obtained a writ of certiorari to review that decision in this court.

Summary of Argument

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed by this court because:

1. The United States Court of Appeals for the Third Circuit correctly determined that the United States District Court for the District of New Jersey had jurisdiction as in any other diversity case.

2. A reversal of the judgment of the United States Court of Appeals for the Third Circuit and a determination by this court that the District Court of the United States had no jurisdiction would constitute a deprivation of the plaintiff's right under the Seventh Amendment to the Constitution of the United States to a trial by jury.

3. The United States Court of Appeals for the Third Circuit correctly determined that the respondent here was not bound by the adverse decisions of the National Railroad Adjustment Board to which neither he nor his intestate had been parties.

ARGUMENT

I. The United States Court of Appeals for the Third Circuit correctly held that the United States District Court for the District of New Jersey had jurisdiction of this cause.

The jurisdiction of the United States District Court for the District of New Jersey invoked originally by the plaintiff, DePriest, and subsequently by the present respondent, Day, as Administrator, has its origin in Article III, Section 2 of the Constitution of the United States, which provides that the "judicial Power shall extend to all Cases * * * between Citizens of different states; * * *." It is founded upon Chapter 646 of the Act of Congress of June 25, 1948, 62 Stat. 930, 28 U. S. C. A. 1332, which provided that the District Courts shall have original jurisdiction over all civil actions where the matter in controversy exceeds the sum or value of \$3,000.00 exclusive of interest and costs, and is between: "citizens of different states * * *." The jurisdictional amount has, since this suit was instituted, been raised by Congress to \$10,000, but the amount actually in controversy exceeds \$10,000 so that even under the amended act the United States District Court clearly has jurisdiction of this suit.

The petitioner urges that the jurisdiction normally possessed by this court is divested by the provisions of the Federal Railway Labor Act and that the National Railroad Adjustment Board created by that Act has exclusive jurisdiction over the controversy pleaded here. It relies upon

Section 3 First (i) of Chapter 347 of the Act of Congress of May 20, 1926, 44 Stat. 578 as amended by Chapter 691 of the Act of June 21, 1934, 48 Stat. 1189, 45 U. S. C. A. 153 First (i), which reads as follows:

“(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes, but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.”

(The jurisdiction conferred by this Act upon the National Railroad Adjustment Board depends, first, upon the existence of a dispute; secondly, upon the fact that the dispute must be between an employee or group of employees on the one hand and a carrier or carriers, on the other hand; and finally, upon the fact that the dispute grows out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.

The cases of *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 66 S. Ct. 322 (1946), re-hearing denied 327 U. S. 814, 66 S. Ct. 525 (1946), *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577 (1950), *Order of Railway Conductors v. Southern Ry. Co.*, 339 U. S. 255, 70 S. Ct. 585 (1950), *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R. Co.*, 353 U. S. 30, 77 S. Ct. 635 (1957) and *State of California v. Taylor*, 353 U. S. 553, 77 S. Ct. 1037 (1957), relied upon by the petitioner, all meet the jurisdictional requirements of Section 3 First (i) and in

particular the requirement that the dispute be between an employee or group of employees and a carrier or carriers.

In *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 66 S. Ct. 322 (1946), a dispute existed between the Order of Railway Conductors which represented road conductors employed by the trustee in bankruptcy of the Central Railroad of New Jersey, on the one hand, and the trustee on the other. In that case this court held that beyond giving instructions to its trustee, a federal bankruptcy court had no jurisdiction to determine as between the disputing parties whether conductors for five daily freight trains operated at Elizabethport should be supplied from the roster of road conductors or from the roster of yard conductors represented by the Brotherhood of Railroad Trainmen.

In *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577 (1950), a dispute arose between the Order of Railroad Telegraphers and the Brotherhood of Railway Clerks concerning the scope of their respective agreements and the application thereof to jobs in the railroad yards at Elmira, New York, of the Delaware, Lackawanna and Western Railroad Company. The railroad company agreed with the Brotherhood of Railway Clerks. The railroad company filed its action in a state court of New York for a declaratory judgment naming both unions as defendants and praying for an interpretation of the agreements and a declaration that the Clerks' agreement and not the Telegraphers' agreement covered the jobs in controversy. This court held that the courts of the State of New York had no jurisdiction to interpret the collective bargaining agreement and that the exclusive jurisdiction so to do was in the National Railroad Adjustment Board.

The same question was raised in *Order of Railway Conductors v. Southern Ry. Co.*, 339 U. S. 255, 70 S. Ct. 585 (1950). In that case certain conductors of the Southern Railway Company claimed extra pay for certain services.

The union which represented them was unsuccessful in persuading the railroad company by negotiation to pay the claims. The railroad then obtained from a state court of South Carolina a declaratory judgment that the collective bargaining agreement did not require the compensation sought. This court followed its decision in the *Slocum* case and held that the South Carolina court was without power to interpret the terms of the agreement and to adjudicate the dispute. It also held that the National Railroad Adjustment Board had jurisdiction of the dispute and that each party had a federal right to invoke the jurisdiction of that Board.

In *Brotherhood of Railroad Trainmen v. Chicago River and Indiana R. Co.*, 353 U. S. 30, 77 S. Ct. 635 (1957), a group of employees of the Chicago River and Indiana Railroad represented by the Brotherhood of Railroad Trainmen asserted 21 grievances against the carrier which employed them. 19 of the claims were for additional compensation, 1 was for reinstatement to a higher position and 1 was for reinstatement in the employ of the carrier. The grievances in question were submitted by the railroad company to the National Railroad Adjustment Board. The Brotherhood issued a strike call. This suit was begun to obtain an injunction forbidding the strike over the grievances pending before the Adjustment Board. This court affirmed a decree granting the injunction sought. It held that a railway labor organization cannot resort to a strike over matters awaiting a decision in the National Railroad Adjustment Board and that the Norris-LaGuardia Act is no bar to the issuance of an injunction to restrain such a strike. It also decided that in such a situation the union did not have the right to elect between a strike, on the one hand, and a determination of the controversy by the National Railroad Adjustment Board, on the other, but that it was bound to permit the controversy to be decided by the National Railroad Adjustment Board.

In *State of California v. Taylor*, 353 U. S. 553, 77 S. Ct. 1037 (1957), the State of California owned and operated a belt railroad as a common carrier which engaged in interstate commerce. A Board of State Harbor Commissioners had the official responsibility for operating the railroad. It entered into a collective bargaining agreement with the Brotherhood of Locomotive Firemen and Engineers and the Brotherhood of Railroad Trainmen which established procedures for promotions, lay-offs and dismissals and fixed rates of pay which differed from their counterparts under the State Civil Service laws. The agreement conformed to the Railway Labor Act. Several years after the agreement had been entered into, a successor Harbor Board instituted litigation in the state courts in which it contended that the belt railroad was not governed by the Railway Labor Act but on the contrary was governed by the State Civil Service laws. The litigation reached the Supreme Court of the state of California which sustained that proposition. Thereafter 5 employees of the railroad filed a suit in the United States District Court for the Northern District of Illinois against the 10 members of the First Division of the National Railroad Adjustment Board and its Executive Secretary, alleging that they had filed claims relating to their classification, extra pay and seniority rights and that the 5 carrier members of the Division had refused to consider the claims on the ground that the Board was without jurisdiction as had been determined by the Supreme Court of California. The question for decision therefore was whether or not the National Railroad Adjustment Board had jurisdiction over the 5 claims or whether it lacked jurisdiction because the carrier was a state-owned railroad company. This court held that the National Railroad Adjustment Board had jurisdiction.

Of the 5 cases relied upon by the petition, each of the first 4 involved a dispute between a group of employees represented by their union and a railroad company as an employer. The latter case involved disputes between 5 in-

dividual employees and their carrier-employer. These cases were all clearly within the jurisdiction of the National Railroad Adjustment Board as the jurisdiction of that Board was defined by Section 3 First (i) of the Act.

However, Congress has not given jurisdiction to the National Railroad Adjustment Board over a dispute between a carrier or carriers on the one hand and a non-employee or group of non-employees on the other. Since Congress has not vested jurisdiction in the Board over disputes between parties having that legal relationship, the Board can legally claim no jurisdiction.

Section 1 Fifth of the Act defines the term "employee" (so far as is material here) as follows:

"The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: * * *."

We contend that in this case the statutory requirement of the employer-employee relationship is entirely absent and that the Board therefore does not have jurisdiction over this controversy. Mr. DePriest at the time this suit was instituted was a pensioner. He was no longer "in the service of the carrier". He was no longer "subject to its continuing authority". The petitioner no longer had the right to "supervise and direct the manner of rendition of DePriest's services." He no longer rendered any "service". He no longer "performed any work". Therefore in a number of particulars DePriest no longer was an employee of the carrier. His Administrator, the present

respondent, is an officer of the Superior Court of New Jersey and as such Administrator does not fit into the statutory designs of an employee of the carrier.

The distinction we thus make between cases over which the Board has jurisdiction and those over which it does not have any jurisdiction does not raise a question of first impression in this court. The case of first impression on this subject was *Moore v. Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (1941). It should be noted that the *Moore* case was decided by this court at a time earlier than any of the decisions on which the petitioner relies. *Moore* had brought a suit in a Mississippi state court against the railroad company claiming that he had been wrongfully discharged contrary to the terms of a contract between the Brotherhood of Railroad Trainmen of which he was a member and the railroad company. He alleged that he was entitled to all of the benefits of the contract. The state trial court rendered judgment against him on the pleadings which was reversed and remanded by the Supreme Court of Mississippi. Thereafter he amended his complaint to seek damages in excess of \$3,000 and the railroad removed the case to the Federal District Court. By permission of the United States District Court, 6 pleas which had been entered by the railroad company were withdrawn and a plea of abatement was filed. It set up that the railroad company is a common carrier in interstate commerce and that it and Moore were subject to the Railway Labor Act and specifically that the Federal Railway Labor Act required adjustment of the dispute by the National Railroad Adjustment Board which remedy Moore had not availed himself of. It argued that because of his failure to do so the suit should be abated. This plea was stricken on demurrer. See *Illinois Central R. Co. v. Moore*, 112 F. 2d 959, 962, 963 (CCA 5, 1940).

The plaintiff had a judgment in the District Court from which the defendant appealed and the plaintiff cross-ap-

pealed. The Circuit Court of Appeals for the Fifth Circuit reversed the judgment on the ground that the District Court had incorrectly applied the Mississippi law of limitations. This court granted certiorari upon the plaintiff's application.

This court determined that the Circuit Court of Appeals had improperly applied the law of the State of Mississippi with respect to the period of limitations and it therefore reversed the judgment of the Circuit Court of Appeals and affirmed the judgment of the District Court. In this court, however, the railroad company argued that the judgment in its favor should be sustained because both the District Court and the Circuit Court of Appeals had erred in failing to hold that the suit was prematurely brought because Moore's failure to exhaust his administrative remedies granted him by the Federal Railway Labor Act as amended. Mr. Justice Black, who wrote the opinion for this court, dealt with the problem in the following language:

"But we find nothing in that act which purports to take away from the courts the jurisdiction to determine a controversy of a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. In support of its contention, the railroad points especially to Section 153(i), which, as amended in 1934, provides that disputes growing out of grievances or out of the interpretation or application of agreements 'shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.' And in connection with this statutory language the railroad also directs our attention to a provision in the agreement between the Trainmen and the railroad—a provision authorizing Moore to

submit his complaint to officials of the railroad, offer witnesses before them, appeal to higher officials of the company in case the decision should be unsatisfactory, and obtain reinstatement and pay for time lost if officials of the railroad should find that his suspension or dismissal was unjust. It is to be noted that the section pointed out, Section 153(i), as amended in 1934, provides no more than that disputes 'may be referred * * * to the * * * Adjustment Board * * *'. It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party * * *'. Section 3(c). This difference in language, substituting 'may' for 'shall', was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 act, nor the act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature." 312 U. S. 630, 634, 61 S. Ct. 754, 756.

Nine years later Justice Black wrote this court's opinion in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577 (1950). The decision of this court in *Order of Railway Conductors v. Pitney*, 326 U. S. 561, 66 S. Ct. 322, had intervened in 1946. In the *Slocum* case where the state courts of New York had upheld the jurisdiction of state courts to render declaratory judgment interpreting collective bargaining agreements in disputes between an employee or a group of employees and a carrier, the Court of Appeals had relied upon the *Moore* case. 339 U. S. 239, 241, 70 S. Ct. 577, 578. The two dissenting judges relied upon *Order of Railway Conductors v. Pitney*, 339 U. S. 239, 242, 70 S. Ct. 577, 578.

This court held that *Order of Railway Conductors v. Pitney* controlled the decision in the *Slocum* case but it was careful to say that at page 244 of 339 U. S. and at page 580 of 70 S. Ct., the holding the *Slocum* case is not inconsistent with the court's holding in the *Moore* case. At another point on the same pages, it said that the holding of the *Moore* case does not conflict with the decision of the *Slocum* case and that no contrary inference should be drawn from any language in the *Moore* opinion. In addition to clearly distinguishing between the holding of the *Moore* case on the one hand and those of the *Pitney* and *Slocum* cases on the other, this court pointed out the reason in the following language:

"He (Moore) could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, *thereby ceasing to be an employee*, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases." *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 244, 70 S. Ct. 577, 580.

Throughout this litigation the petitioner has refused to recognize that this court has pointed out the distinction and the reason for the distinction between *Moore* and *Slocum*. It has argued and argues here that discharge cases and discharge cases only are to be excepted from the general proposition that the National Railroad Adjustment Board has exclusive jurisdiction to adjust grievances and disputes. It seems to treat discharge cases as an isolated exception which this court has engrafted upon the Federal Railroad Labor Act, when in point of fact the reason for the distinction basically lies in the fact that the relationship of employer and employee is essential to the jurisdiction of the Board and that discharge cases are not within the jurisdiction of the Board because of that fact. Certainly

it must be true that if discharge cases may be tried before the courts of common law for want of an employer-employee relationship, other cases involving railroads may also be tried in the courts of common law if in time also the relations of employer and employee is lacking.

After this court distinguished between *Pitney* and *Moore* and reaffirmed its holding in the *Moore* case in *Slocum v. Delaware L. & W. R. Co., supra*, the doctrine of the *Moore* case was widely applied, courts being careful to make certain that the plaintiff had irretrievably accepted the railroad's action in discharging him as final. At page 45 of the Appendix to this brief, we have set down a large number of citations of cases where this principle has been applied.

Again this court reaffirmed the principle that a discharged railway employee may make his election to treat his discharge as final and bring a common law action in the courts for damages for a wrongful discharge without violating the provisions of the Federal Railway Labor Act. *Transcontinental and Western Air, Inc., v. Koppal*, 345 U. S. 653, 73 S. Ct. 906 (1953). The *Koppal* case differed from the *Moore* case in that this court held that where a discharged employee brought his suit for a wrongful discharge against a railroad company in a federal court where jurisdiction was based upon diversity of citizenship, the federal court must apply state law with respect to the exhaustion of administrative remedies as a prerequisite to the right to sue for damages but its basic holding in the *Moore* case was reaffirmed. At page 660 of 345 U. S. and page 910 of 73 S. Ct., this court quoted from and cited the *Moore* case with approval and it also quoted from its opinion in the *Slocum* case where it set forth the reason for the distinction.

The United States Court of Appeals for the Third Circuit in considering this matter below took cognizance of

the definition of the word "employee", as contained in Section 1 Fifth of the Act and of Section 3 First (i) defining the jurisdiction of the Board (R. 34). It carefully considered this court's decision in the *Moore* case and in the *Slocum* case (R. 34) and it quoted from and relied upon this court's language in the *Slocum* case where the *Moore* case was discussed and the same language which this court itself quoted and relied upon in the *Koppal* case. The court below has therefore very carefully and perfectly correctly applied the law as declared by this court.

We respectfully urge upon the court that a perfect parallel exists between a discharged employee and a retired employee so far as the jurisdiction of the National Railroad Adjustment Board on the one hand and that of the courts on the other is concerned. In the case of a discharged employee the relationship of employer and employee has been terminated by the unilateral action of the employer while in the case of a retired employee the relationship of employer and employee has been terminated by the unilateral action of the employee. Neither one is thereafter in the service of the carrier, subject to its continuing authority, supervised or directed by the carrier, or performing any work for the carrier. Each of them therefore fails to fit within the statutory definition.

The petitioner argues that the court below misconstrued Section 3 First (i) of the Act in that it determined the case on the status of the claimant and lost sight of the nature of the dispute. The dispute arose, it contends, while the relationship of employer and employee existed and that the time of the origin of the dispute is the time as of which the court should have determined whether or not the status of employer and employee existed (Petitioner's Brief, 27, last 2 paras.). It enlarges upon this theme by arguing that it was the intent of Congress that the National Railroad Adjustment Board should have exclusive jurisdiction to interpret the highly technical and specialized bargaining

agreements of the railroad industry and that to allow the courts to interpret these agreements as incidental to its jurisdiction over wage claims, might-produce a different result as between the carrier and the retired employee from that reached in a like dispute between the carrier and an employee in the active service (Petitioner's Brief, 25), that unrest among railway laborers might thereby be created and strikes might result, all in frustration of the congressional policy.

Our answer to this contention is that all of these problems were considered and determined by this court in its discussion of the *Moore* case in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 244, 70 S. Ct. 577, 580 (1950). In the first place, it is obvious that if a railway employee is discharged by his employer, the discharge results from some conclusion or determination made by the employer prior to the discharge and therefore during the period of employment. If the decision to discharge is based upon misconduct of the employee, it is, of course, based upon misconduct allegedly committed or performed while he was an employee. Therefore in a common law action for damages for an unlawful discharge, the issue as to whether or not the discharge was proper and lawful has its origin in matters and things which occurred at a time when the employment relationship existed. *Passino v. Brady Brass Co.*, 86 N. J. L. 419, 84 A. 615 (S. Ct. 1912). The question of the discharged employee's wages is a matter in issue. *Moore v. Central Foundry Co.*, 68 N. J. L. 14, 52 A. 292 (S. Ct. 1902), *Roselle v. LaFera Contracting Co.*, 18 N. J. Super. 19, 86 A. 2d 449 (Super. Ct. Ch. Div., 1952).

In its discussion of the *Moore* case in Mr. Justice Black's opinion in *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239, 244, 70 S. Ct. 577, 580, this court said:

"A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions

of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

The Court of Appeals in considering the contention of the petitioner now being discussed as affirming the language of this court just quoted herein, applied and followed the principles announced by this court (R. 35-37). We respectfully urge upon your Honors that the Court of Appeals was correct in not discerning any distinction between the right of a discharged employee and the right of a pensioned employee to invoke the jurisdiction of a common law court.

There is also strong evidence that a railway employee has the right to sue for his wages in a court of common law jurisdiction, irrespective of whether that employee is pensioned, discharged or still in the active service of the carrier. The decision of this court in one of the early landmark cases under the Federal Railway Labor Act after its amendment in 1934, *Elgin, J. & E. Ry. Co. v. Burley*, 325 U. S. 711, 65 S. Ct. 1276, is one of the cases which furnishes some of this evidence. This was a suit originally instituted in the District Court for the Northern District of Illinois in which the plaintiffs sought to enforce penalty time claims for alleged violations by their employer of the starting time provisions of a collective bargaining agreement. Officers of the Brotherhood of Railroad Trainmen had progressed these grievances to the National Railroad Adjustment Board. During the pendency of the actions at the Board an agreement was reached between the railroad and officers of the Brotherhood which resulted in a withdrawal of most of the claims from the Board. However, a further dispute arose as a result of which the Brotherhood made a further submission to the Board which resulted first in a deadlock by the Board and then in a decision

with the aid of a referee that the claims had been disposed of by the agreement of the parties. Thereafter this suit was instituted and in it the plaintiffs asserted that the Brotherhood was without authority either to settle their claims or to submit the claims to the National Railroad Adjustment Board for determination, to the exclusion of the rights of the plaintiffs to assert them in a suit brought for that purpose. The United States District Court granted a summary judgment in favor of the defendant. The plaintiffs appealed to the Circuit Court of Appeals for the Seventh Circuit which reversed, 140 F. 2d 488 (1944), on the ground that the record presented a question of fact as to whether the compromise of the plaintiffs' claims had been compromised with their authority. The railroad was granted certiorari by this court, 323 U. S. 690, 65 S. Ct. 45 (1944). This court's decision was in an opinion by Mr. Justice Rutledge reported in 325 U. S. 711, 65 S. Ct. 1276 (1945). In the second paragraph of its opinion this court noticed that the judgment of the District Court was a summary judgment, page 712 of 325 U. S. and page 1284 of 65 S. Ct. At pages 719 and 720 of 325 U. S. and at page 1288 of 65 S. Ct., this court reviewed the effects of the judgments of the District Court and of the Court of Appeals, saying,

"The District Court's judgment rested squarely on the conclusive effect of the award in Docket No. 7324 * * * but it must be taken to have held that upon the pleadings and affidavits, no genuine issue of material fact was presented, * * *."

"The Court, of Appeals, however, made no reference to the issues concerning the award and its effect upon the claims. But its judgment must be taken to have determined implicitly that none of petitioners' contentions in these respects is valid."

This court then called attention to the fact that the petitioner contended and the District Court had held that the award of the Board was validly made, and is final, pre-

cluding judicial review. This court further determined that the question of the finality of an award of the Board could not be reached until the question of the validity of the award was first determined and it then stated the grounds upon which the respondents attacked the validity and legal effectiveness of the award.

This court then construed the Railway Labor Act and held that the Brotherhood representing the craft to which the respondents belonged, while having full authority to negotiate collective bargaining agreements for the future, did not necessarily have authority to compromise accrued and vested claims of its members without their authority or knowledge. It affirmed the judgment of the Court of Appeals and remanded the cause for further proceedings in conformity with its opinion. After rehearing the former opinion of this court was adhered to. 327 U. S. 661, 66 S. Ct. 721 (1946).

Nowhere in either of the opinions of this court does this court suggest that the United States District Court for the Northern District of Illinois lacked jurisdiction over Burley's wage claim. While the opinions of this court do not indicate that the parties raised the question of jurisdiction, the petitioner in that case was making a stronger claim that is made by the petitioner in this case, for it contended that the controversy already having been to the Board there was no opportunity for judicial review. If this court had considered that a railway employee has no right to assert in court a claim for wages and that the exclusive remedy lies at the National Railroad Adjustment Board, here was an excellent opportunity for this court to have said so. Had that been this court's opinion and judgment, the District Court's judgment would have been sustained on the ground of want of jurisdiction. On the contrary, this court affirmed a reversal of the judgment of the District Court and directed that the cause proceed at the suit of the plaintiffs in conformity with this court's opin-

ion. This is certainly a strong indication that by implication at least this court had approved jurisdiction of common law courts over wage claims by an employee of a railroad against his employer.

This point, however, was more clearly established in the case of *Ceparo v. Pan American Airways*, 195 F. 2d 453 (C. C. A., 1952), certiorari denied 344 U. S. 840, 73 S. Ct. 50, rehearing denied 344 U. S. 882, 73 S. Ct. 174 (1952). In that case the United States Court of Appeals held that employees of an airways corporation seeking to recover wages claimed to be due under a collective bargaining agreement were entitled to assert those claims in a common law court in the same way that they could seek damages for an unlawful discharge. The federal jurisdiction was predicated upon diversity of citizenship and the Court of Appeals after considering this court's decisions in the case of *Slocum v. Delaware, L. & W. R. Co.*, *Order of Railway Conductors v. Southern Railway Co.*, *Order of Railway Conductors v. Pitney*, and *Moore v. Illinois Central R. Co.*, all *supra*, held that a suit by an employee for his wages was governed by the *Moore* case and not by the *Slocum*, *Southern Railway Co.* and *Pitney* cases. This court not only denied certiorari, but denied a rehearing on the application for the certiorari.

The consideration of this case by the United States Court of Appeals for the Third Circuit involved a review of the principles which this court has declared and resulted in a judgment which is wholly consistent with the prior decisions of this court, all of which are now firmly established law. The petitioner seeks a result which would be out of line not only with the earlier decisions of this court but with the reasoning upon which they are founded. The judgment of the United States Court of Appeals entered below in this cause should therefore be affirmed.

II. A reversal by this Court of the judgment below would violate the rights of the respondent under the Seventh Amendment to the Constitution of the United States.

A suit at law by a servant or agent for his wages or compensation, provided for by an express contract took the form of an action of assumpsit. The respondent's claim has been asserted in a court which is equipped to entertain and give the same type of relief as were afforded by the courts of common law. The United States District Court is equipped to afford the respondent with a trial by jury to which he was entitled at common law. He is also entitled to a trial by jury as a matter of right because the Seventh Amendment to the Constitution of the United States has preserved that right to him in the following language:

"In suits at common law, where the value in controversy shall exceed \$20.00, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

This court construed the Seventh Amendment in *Parsons v. Bedford*, 3 Pet. 433 (1830), in opinion by Mr. Justice Story in which he said, at page 446, *et seq.*:

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy. The right to such a jury is, it is believed, incorporated into, and secured in every state constitution in the Union; and it is found in the Constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. Since the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Con-

gress; and it received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. . . . At this time, there were no states in the union, the basis of whose jurisprudence was not essentially that of the common law, in its widest meaning; and probably, no states were contemplated in which it would not exist. The phrase 'common law', found in this clause, is used in contradistinction to equity, and admiralty and maritime jurisdiction. The Constitution had declared, in the Third Article, 'that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority,' &c., and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes in court of equity and admiralty, juries would not intervene, and that court of equity with the trial by jury only in extraordinary cases, to inform the conscience of the court. When, therefore, we find, that the amendment requires that the right of trial by jury shall be preserved, in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the Constitution denominated in the Third Article, 'law'. Not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit."

This court has also decided that the word, "jury", as used in the Constitution means a jury constituted of 12 persons as at common law, neither more nor less. *Thompson v. Utah*, 170 U. S. 343, 349 (1898).

The petitioner here would have this court declare that some event or law had supervened to deprive the right of

this respondent to a trial by jury in a federal district court, the diversity of citizenship and the minimum jurisdictional value of the matter or thing in controversy being present—and that the event which has supervened is the enactment of the Federal Railway Labor Act. Certainly if the petitioner can persuade this court that the petitioner is correct in the position which it takes here and that the United States Court of Appeals for the Third Circuit was in error in the judgment entered by it below, the effect thereof is to deprive this respondent of his right and opportunity to have his dispute tried by a jury in a common law court and to remit him to the National Railroad Adjustment Board in Chicago. Division 1 of the National Railroad Adjustment Board to which this controversy would go if it went to the Board, consists of 10 members 5 of whom are selected and designated by the carriers and 5 of whom are selected and designated by the national labor organizations of the employees. Section 3 First (h). According to the latest information available to the respondent one of the 5 carrier members is an employee of the petitioner. The respondent understands this circumstance alone to fall within an earlier holding of this court that the respondent is thereby deprived of due process of law. *Tumey v. State of Ohio*, 273 U. S. 510, 47 S. Ct. 437 (1927). These members are not compensated by the United States as are the members of a jury but they are compensated by the parties whom they represent. Section 3 First (g). If the respondent's information adverted to above is correct, one of the judges of his cause is a person whose services are paid for by the respondent's adversary, the petitioner in this case. In the event of a deadlock or the failure of the respondent to secure a majority vote of the Division members, a neutral person or referee would be selected to sit with the Division as a member thereof and make an award. Section 3 First (1). This would be at best a Board whose membership is only 11 and it could not, therefore, be numerically the equiv-

alent of a jury at common law. In the event of a decision adverse to the respondent the award would be final and binding. Section 3 First (m). While a right of a trial in a Federal District Court *de novo* is provided for in Section 3 First (p), in the event that the employee is successful and is required to bring an enforcement suit, no companion provision is made by the Act for a trial *de novo* if the result is adverse to the respondent here. In fact it has been held that the employee in such a situation has no right of review. *Barnett v. P.R.S.L.*, 245 F. 2d 579 (C. C. A 3, 1957), *Sigfred v. Pan American World Airways*, 230 F. 2d 13 (C. C. A. 5, 1956), certiorari denied 351 U. S. 925, 76 S. Ct. 782 (1956).

On the other hand, if the respondent should be successful at the Board, the Board's order is not self-executing and the petitioner would have the right to refuse to comply with the order until the respondent brought an enforcement suit under Section 3 First (p). *Washington Terminal Co. v. Boswell*, 124 F. 2d 235 (C. C. A., D. C., 1941), affirmed by an equally divided court 319 U. S. 785, 63 S. Ct. 1430 (1943). In any enforcement suit presumably the respondent here would have the right of trial by jury since Section 3 First (p) provides that such suit shall proceed in all respects as other civil suits. However, although the result reached by the Board may have been in the respondent's favor, any fact resolved by the Board against him is to be accepted in the enforcement suit *prima facie* as found by the Board. The result is that even though the respondent in this limited situation may have a right of trial by jury, the facts to be tried by that jury are authorized by Section 3 First (l) to be reexamined otherwise in the Federal District Court than according to the rules of the common law.

Lest we lose sight of the basic premise, it should be reiterated that only in the limited circumstances delimited by Section 3 First (p), does the respondent here have any opportunity to a trial by jury? He has no right to a trial

by jury unless he wins his case at the Board. "If he loses he is without remedy and he would have nowhere enjoyed the right of trial by jury preserved to him by the Seventh Amendment to the Constitution of the United States.

We, therefore, strongly urge upon the court that not only is the respondent entitled to have the judgment of the United States Court of Appeals for the Third Circuit affirmed in this court because the judgment was correctly entered, but also because any other result except an affirmance would deprive him of his constitutionally confirmed right of trial by jury.

III. The judgment under review cannot be properly reversed on the ground relied upon by the United States District Court that the respondent here is bound by the decisions of the Board in companion cases to which he was not a party.

When this cause first came before the District Court, it decided that it had jurisdiction of the cause because of the fact that all of the requisites of a diversity case were present but it took cognizance of the fact that several companion cases were pending before the National Railroad Adjustment Board. *DePriest v. Pennsylvania R. Co.*, 145 F. Supp. 596 (D. C., N. J., 1956). It went further, however, and suggested that a result in the other cases at the Board unfavorable to the employees might bind the respondent here in such fashion as to require a dismissal of his suit, whereas, if the employees were successful at the Board, the respondent had a right to invoke the jurisdiction of the court in an enforcement suit under Section 3 First (p).

Pending the decision of an appeal to the United States Court of Appeals by DePriest from an order of the District Court which stayed all proceedings pending the ultimate decision in the matters before the Board, the Board decided those cases in favor of the railroad company. At

about the same time the United States Court of Appeals dismissed the appeal taken by DePriest on the ground that the order appealed from was interlocutory in character and there was no appellate jurisdiction to entertain the appeal. *Day, Admr. v. Pennsylvania R. Co.*, 243 F. 2d 485 (1957).

Thereafter this matter again came before the District Court on petitioner's motion for a dismissal for lack of jurisdiction. The District Court reasoned that if the award had been favorable to the employees, DePriest could have taken the benefit thereof and could have brought an enforcement suit such as was brought in *Kirby v. Pennsylvania R. Co.*, 188 F. 2d 793 (C. C. A. 3, 1951). The court went on to reason that if DePriest could take the benefit of the award he was also burdened and bound by its disadvantages (See Judge Madden's opinion, R. 20, second para.). The United States Court of Appeals for the Third Circuit carefully pointed out that neither DePriest nor Day were parties to the litigation which had been pending before and had been recently decided by the Board nor had they been given any notice thereof. Judge Kalodner, who wrote for the court below, dealt with the District Court's reasoning at page 37, third paragraph of the Record. He concluded that on the showing made by the petitioner, a summary judgment entered in petitioner's favor was erroneous.

We urge that the District Court was in error in its reasoning, first, because the Federal Railway Labor Act fairly construed did not justify it in reaching the conclusion that DePriest was barred from relief in what happened in some other persons' case; and, secondly, because the learned District Court Judge assumed without having any evidence before him that the awards of the Board were valid, regular and final, whereas, in fact, they were subject to serious constitutional and other legal objections which we will discuss in particular.

In our opinion the District Court misconceived and misapplied Section 3 First (p) of the Act and the decision of the United States Court of Appeals for the Third Circuit in *Kirby v. Pennsylvania R. Co.*, 188 F. 2d 793. The Act in Section 3 First (p) gives the right to bring an enforcement suit to him who was petitioner before the Board or to any person for whose benefit such order was made. It does not by its terms provide that if the award is adverse to the employee that any employee who could have sued, had the award been for his benefit, is bound by an adverse award. The United States Court of Appeals in the *Kirby* case had before it an award which had been made in favor of a petitioning employee and for the benefit of others adversely affected by the carrier's action. The District Court in discussing the *Kirby* case, in the first of its opinions in this case, said:

"While the plaintiff here (DePriest) is not an actual party before the National Railway Adjustment Board, the statute provides for the enforcement of a Board order not only at the suit of the petitioner before the Board but for any person for whose benefit such order was made. This Circuit in *Kirby v. Pennsylvania R. Co.*, 2 Cir., 188 F. 2d 793, approved this right given by the statute so that the plaintiff would have a basis for his action *if the interpretation by the Board of this question is favorable to the petitioners before that body even though plaintiff here is not one of them.*" 145 F. Supp. 596, 598 (Parenthetical matter and italics, ours.)

The learned District Court therefore clearly recognized that the doctrine of the *Kirby* case applied only "when the interpretation by the Board of this question is favorable to the petitioners before that body" and in the language of the statute when, "a carrier does not comply with an order of a Division of the Adjustment Board within the time limited in such order."

An entirely different provision of the statute deals with the binding effect and quality of an award of the Board. Section 3 First (m), 45 U. S. C. A. 153 First (m). In so far as is material here, it provides as follows:

"The awards of the several Divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. . . ."

The District Court did not cite or refer to this section of the statute.

Congress has, therefore, by law provided that the awards of the National Railroad Adjustment Board except in so far as they shall contain a money award are final and binding upon both parties to the dispute. In light of the fact that the general rule of law is that a judgment estopped only those persons who were parties to the action in which the judgment was rendered and their privies, 50 C. J. S. 288, 289, 30 Am. Jur. 908, Para. 161, it would seem that if Congress had intended to depart from the well-understood general rule derived from the common law that it would have expressly said in Section 3 First (m) that the award was binding upon other than the parties to the dispute, which it did not do. It certainly had in mind as is evident from Section 3 First (p) the concept that persons other than those who were parties to the dispute might benefit from the award and the fact that it has not expressly or by necessary implication said that the same class of parties are bound by the award, strongly indicates that Congress did not intend them to be bound by an adverse award.

In *Elgin, J. & E. Ry. Co. v. Burley*, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945), Burley complained of an adverse award of the National Railroad Adjustment Board to which he was apparently a party through the

agency of the Brotherhood of Railroad Trainmen. He contended that the Brotherhood did not have his authority to represent him in the proceeding before the Board. It appears from the opinion of this court at page 717 of 325 U. S. and page 1287 of 65 S. Ct., that the claim submitted to the Board was a claim for a class consisting of "each foreman and each helper". When this claim was denied, Burley instituted his action in the District Court claiming that he had not authorized the Brotherhood to represent him and that he had not been notified of the Board's hearing and had not been given an opportunity to participate therein.

With respect to this, Mr. Justice Rutledge, who wrote for this court, said at page 735 of 325 U. S. and page 1297 of 65 S. Ct.:

" * * * but whether or not the collective agent had rights, independent of the aggrieved representative of the collective interest and for its protection in any settlement, whether by agreement or in proceedings before the Board, an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by Section 3 First (j). These rights are separate and distinct from any the collective agent may have to represent the collective interest. For an award to affect the employee's rights, therefore, more must be shown than that the collective agent appeared and purported to act for him. It must appear that in some legally sufficient way he authorized it to appear in his behalf."

This court held that whether or not the Brotherhood had authority to act for Burley in submitting a complaint to and appearing before the National Railroad Adjustment Board was not a question which the District Court could determine on a motion for summary judgment. Its opinion cited above was adhered to in 327 U. S. 661, 66 S. Ct. 721, 90 L. Ed. 928.

The importance of the *Burley* case on this point lies in the fact that this court held that if in fact Burley was not represented personally and individually by a railroad brotherhood in a proceeding before the Board, he was not bound by an adverse result reached by the Board which affected other members of the class to which he belonged. The present case is even stronger than the *Burley* case in that no one makes any contention that DePriest was before the Board and subject to its jurisdiction either personally or by attorney. The trial judge determined that whether he was before the Board or not, he was bound by the decision in other cases similar to his solely because of the similarity of issues.

The learned court below considered that the *Elgin* case was sufficient authority to establish the fact that one of a class is not bound by an adverse result at the Board of Adjustment to which he was not a party (R. 35, line 7).

Additionally the Judge of the District Court to reach the result that he did on the reasoning which he employed was forced to assume that the awards of the National Railroad Adjustment Board by which DePriest was to be bound under his judgment were legally unassailable. This we would like to point out is not true because suit has been brought by those claimants in the United States District Court for the purpose of attacking the validity of the very award the District Judge assumed was valid. The case of *Elgin J. & E. Ry. Co. v. Burley*, 325 U. S. 711, 720, 65 S. Ct. 1282, 1288, gives such a right.

Although that case has not been determined but is being held by an order of the court to await the decision in this case, the plaintiffs there make the following attack upon the validity of those awards:

1. They claim that they did not voluntarily elect to submit to the jurisdiction of the National Rail-

road Adjustment Board but rather preferred to elect to submit their claims to the United States District Court for the District of New Jersey in the first instance and they point to a judgment of that court requiring them to go to the Board in lieu of obtaining judgment from that court. See *Naylor, et als. v. Pennsylvania R. Co.*, 10⁶ Supp. 84 (D. C., N. J., 1952).

2. A member of Board which decided the cases was biased by a personal interest in the controversy adverse to the claimants' interests and the vote of this member affected the outcome. When those cases were ready for argument before the Board, it was discovered that one of the carrier members of the Board was a designee and furloughed employee of the Pennsylvania Railroad Company who was being paid by the Pennsylvania Railroad Company under the law to sit in judgment of those cases. The Board deadlocked 5 to 5 in these decisions which means that if the legally disqualified member had disqualified himself in fact the claimants would have won their cases by a vote of 5 to 4. This was a denial of due process of law. *Tumey v. State of Ohio*, 273 U. S. 510, 47 S. Ct. 437 (1927).

3. The awards were procured by the fraud of the petitioner herein. The railroad's defense to the actions at the Board were that the tracks over which the employees rendered their services were belt line tracks and that they were not to be regarded as tracks of a railroad foreign to the tracks of the Pennsylvania Railroad Company. Yet disappointed employees expect to be able to prove by Plate VII-3, which is an exhibit in a report for the Delaware River Joint Commission of Pennsylvania and New Jersey by Knappen Tippetts and Abbett Engineering Co. in November, 1948 and submitted to the Legislatures

of the States of New Jersey and Pennsylvania, that this contention is palpably false and further that an agreement exists whereby the Baltimore and Ohio Railroad Company will reimburse the Pennsylvania Railroad Company for penalty time claims of its train and engine crews operating over these very tracks. The plaintiffs in said action have every reason to believe that such an agreement exists because in the Knappen Tippetts and Abbett report aforesaid, at page 44 thereof, the following statement appears:

"From Moore Street to Bigler Street joint Pennsylvania-Baltimore and Ohio operation exists, each railroad placing its own cars at all locations other than those actually owned by the other. *The only exception to this joint operation is the switching at Piers 98-S and 100-S where, by special agreement, all work is done by Pennsylvania crews.*" (Emphasis ours.)

The Pennsylvania Railroad Company has never admitted or denied in this controversy the existence of such agreement. Because of both deficiencies hereinafter to be discussed, employees have never been able to prove this fact responsibly asserted in a public document, but the railroad company by its silence on this issue has defrauded the Board into ignoring the true situation, since its allegations do not have to be and were not in fact supported by oath or affirmation.

4. The claimants were prevented from disclosing the defendant's fraud and from presenting to the Board the material evidence because the Board has no compulsory process or discovery proceedings and for the further reason that the Board's procedure under the Act consists solely in the submission of unverified pleadings. See Section 3 First (i), last clause. As we have suggested under Point 3, the

documents, records and information needed to competently prove the claimants' case was in the possession of the adverse party, the petitioner now before this court. The act gives the Board no power of subpoena and the Board asserts none. Since the controversy is unfolded to the Board by pleadings, there is no confrontation by one party of witnesses to the other for cross-examination. The Act provides no opportunity for discovery nor does the Board have any machinery for such. One claimant sought discovery in aid of the Board's jurisdiction in the United States District Court for the District of New Jersey but his action was dismissed on the ground that the court had no jurisdiction. *Amand v. Pennsylvania R. Co.*, 17 F. Rules Dec. 290 (1955).

5. Defendant's proofs were not required to be supported by oath or affirmation. Since the fact-finding power of the National Railroad Adjustment Board should be used for the purpose of searching out the truth and finding the facts in accordance therewith, it becomes exceedingly important that claims and defenses should be supported by oath or affirmation of a person having knowledge of the facts asserted. This was not done in the cases wherein the awards were relied upon by the District Court and the omission becomes a very serious matter in light of the fact that neither the Federal Railway Labor Act nor the Board nor the Federal Rules of Civil Procedure give any party a way to ferret out facts and information within the possession of his adversary unless the adversary party is bound by his own good conscience to disclose it. The allegations of the Knappen Tippetts and Abbett report were called to the attention of the railroad company as well as the Plate in question and that company has declined either to admit or deny the truth thereof. It has knowledge of what the facts are and to

withhold them from the fact-finding agency of little power in developing the evidence is a very serious fraud upon the rights of the disappointed claimants and in fact upon the rights of the respondent in this proceeding who is sought to be bound by such tainted awards.

6. The claimants were denied their statutory and constitutional right of a hearing. The Federal Railway Labor Act, Section 3 First (j) gives the right to parties to be notified of a hearing involving their matter and a right to be heard thereat. In the cases by which the District Court sought to bind the respondent in this matter a hearing was held by 10 members of a National Railroad Adjustment Board but when the Board decided those matters 5 members of the Board who had heard the argument were no longer members of the Board. 5 new members participated in the decisions who had never heard the oral argument and who were completely unknown to the claimants. When the Board deadlocked as it did a referee was called in "to sit with the Division as a member thereof, and make an award". He was to be a "neutral person". Section 3 First (l). As soon as the claimants had learned of the deadlock in the Board and of the fact that a referee was to be called upon they requested in writing an opportunity to be heard by the referee which request was refused by the Board. They then requested an opportunity to brief the matter for the referee and this request was denied by the Board. Consequently these claims upon which the District Court relied and by which it sought to estop the respondent here were proceedings in which 6 members of a Board of 11 had never sat in any hearing in which the claimants participated and who refused to sit and hear the claimants upon their request. It is respectfully urged upon this court that such conduct was not

only a denial of the right to be notified and the right to be heard granted by the Act but it was such a denial of the basic elements of fair play as to constitute a clear deprivation of the claimants' property without due process of law. Of course, it goes without saying that if the claimants themselves were being deprived of their property without due process of law, any effort by the District Court below to bind the respondent here by any such an award was also a deprivation of his property without due process of law.

7. It is alleged in said suit that the awards relied upon by the District Court were not based upon any or substantial evidence but upon fraud. We have given a synopsis of this point under Point 3.

8. It is further alleged that the awards relied upon by the District Court below as a basis of estoppel of the respondent herein constituted a deprivation of the property of those claimants without due process of law. We have also suggested the merit of this contention under Point 6.

The petitioner did not in the United States Court of Appeals for the Third Circuit attempt to uphold the judgment of the United States District Court for the District of New Jersey upon the basis which the court had used in reaching its conclusion. Neither does it do so here. We submit the reason that it has not done so is that the reasoning of the District Court on this point cannot be successfully defended. We argue the point, however, to the end that, if any suggestion should be made, that the judgment of the court below should be reversed because the District Court decision was correct, that this court will not be left with the impression that this respondent accedes to that viewpoint.

In concluding this brief we should also like to remark that we are aware of the fact that in outlining the contentions which are being made in the United States District Court against the validity of the awards upon which the District Court relied, we are calling to this court's attention factual material which is not within the record in this case. We do so, however, in the belief that, first, it demonstrates the fallacy that exists in the willingness of the District Judge so quickly and conclusively to assume the validity of those awards for the purpose of estopping the respondent here, and, secondly, to indicate to this court that the claimants in those cases did not regard the awards as final and have taken steps to have them nullified upon grounds which appear to be supported by reason and justice.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

Relevant Statutory Provisions

Railway Labor Act—

Section 1 Fifth, 45 U. S. C. A. 151 Fifth:

“Fifth. The term ‘employee’ as used herein includes every person in the service of the carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

“The term ‘employee’ shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple. 44 Stat. 577; 48 Stat. 926; 48 Stat. 1185; 49 Stat. 1921; 54 Stat. 785, 786; 62 Stat. 991; 63 Stat. 107.

Section 3 First (g), 45 U. S. C. A. 153 First (g):

“(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section

shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party."

Section 3 First (h), 45 U. S. C. A. 153 First (h):

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

Section 3 First (i), 45 U. S. C. A. 153 First (i):

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Section 3 First (j), 45 U. S. C. A. 153 First (j):

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

Section 3 First (l), 45 U. S. C. A. 153 First (l):

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then

the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

Section 3 First (m), 45 U. S. C. A. 153 First (m):

“(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

Section 3 First (p), 45 U. S. C. A. 153 First (p):

“(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs

shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

**CITATIONS OF CASES FOLLOWING AND APPLYING PRINCIPLE
OF MOORE V. ILLINOIS CENTRAL RAILROAD CO., 112 F. 2d
959 (C. C. A. 5, 1940)**

Kelly v. Nashville, C. & St. L. Ry., 75 F. Supp. 737
(D. C., E. D. Tenn., S. D., 1948);

Kendall v. Pennsylvania R. Co., 84 F. Supp. 875
(D. C., N. D., Ohio, E. D., 1950);

Piscitelli v. Pennsylvania-Reading Seashore Lines,
11 N. J. Super. 46, 77 A. 2d 910 (Sup. Ct., App.
Div., 1950);

Priest v. Chicago, R. I. & P. R. R., 189 F. 2d 813
(C. C. A. 8, 1951);

Newman v. Baltimore & O. R. Co., 191 F. 2d 560
(C. C. A. 3, 1951);

Condal v. Baltimore & O. R. Co., 199 F. 2d 400
(C. C. A., D. C., 1952);

Oswald v. Chicago, B. & Q. R. Co., 200 F. 2d 549
(C. C. A. 8, 1952);

Barker v. Southern Pacific Co., 214 F. 2d 918
(C. C. A. 9, 1954);

Walters v. Chicago & N. W. Ry. Co., 216 F. 2d 332
(C. C. A. 7, 1954);

Peoples v. Southern Pacific Co., 139 F. Supp. 783
(D. C. Oregon, 1955), affirmed 232 F. 2d 707
(C. C. A. 9, 1956);

Sjaastad v. Great Northern Ry. Co., 155 F. Supp.
307 (D. C., N. D., 1957).

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No. 397.

IN THE
Supreme Court of the United States

October Term, 1958.

PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

vs.

GEORGE M. DAY, Administrator ad Litem of the
Estate of Charles A. DePriest,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Third Circuit.

Reply Brief for Petitioner

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OCTOBER TERM, 1958.

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PENNSYLVANIA RAILROAD COMPANY,
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GEORGE M. DAY, Administrator ad Litem of the Estate of
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Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

I. RESPONDENT'S POINT II IS NOT WITHIN THE QUESTION PRESENTED.

The Respondent's contention in Point II of his Brief, commencing on page 24, that he would be deprived of a trial by jury if this Court reverses the judgment below, does not call for consideration on the merits in the case before this Court. The contention now raised by the Respondent is not within the question set forth in the Petition or fairly comprised therein. The issue here is, does a District Court acquire jurisdiction of an alleged wage claim, constituting a grievance, under a railroad collective bargaining agreement solely because the claimant has left active service or is exclusive jurisdiction of such subject matter in the National Railroad Adjustment Board?

Respondent's contention that he is entitled to a trial by jury, even if before the Court, is as applicable to employees in active railroad service as to those who have left railroad service. Implicit in the holding of this Court in *Slocum v. D. L. & W. R. Co.*, 339 U. S. 239 (1950), is a denial of respondent's argument that an employee with a claim or grievance under a railroad collective bargaining agreement is entitled to sue his employer in court and demand a jury trial, rather than progress the dispute to the National Railroad Adjustment Board. In that case this Court said: "We hold that the jurisdiction of the Board to adjust grievances and disputes of the type here involved is exclusive" (339 U. S. at p. 244).

Furthermore, Respondent's claim for extra compensation is based upon a railroad collective bargaining agreement, entered into by petitioner and the craft or class of employees to which DePriest belonged pursuant to the terms of the Railway Labor Act and in contemplation of the disputes ad-

justment procedures provided by Congress for the railroad industry and its workers. This is not a simple action for wages based on an individual contract of employment; it is a claim under an agreement covering and affecting many employees to which Congress has seen fit to give special status.

II. RESPONDENT'S POINT III IS NOT WITHIN THE QUESTION PRESENTED.

The Respondent's contention in Point III of his Brief, commencing on page 28, is that the judgment under review cannot be properly reversed on the ground relied upon by the United States District Court that the Respondent is bound by the decisions of the Board in "companion cases" to which he was not a party. This does not call for consideration on the merits here, since it was not alleged by Respondent as a "ground why the cause should not be reviewed by this Court" under Rule 24 (1) of the Revised Rules of the Supreme Court. Likewise, this question, now raised by the Respondent, was not raised in the Petition for Certiorari, nor in the question involved. Furthermore Respondent states in his Brief on page 39, that in outlining the contentions which are being made in the United States District Court against the validity of the awards in other cases, upon which the District Court relied, he is calling to this Court's attention factual material which is not within the record in this case.

Respondent's Point III is basically unsound, since it presupposes that the District Court had jurisdiction of the subject matter of this suit, while the sole question presented to the Court in this case is whether by reason of the inactive status of the claimant, the District Court had jurisdiction of the subject matter or was exclusive jurisdiction of this grievance claim in the National Railroad Adjustment Board.

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CONCLUSION.

Respondent's contentions under Points II and III of his Brief are not raised by the question presented, nor are they fairly comprised therein. Petitioner in thus pointing out the limits of the question involved does not imply any support on the merits with respect to Respondent's contentions concerning jury trial or the finality of Board awards.

Respectfully submitted,

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